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OUTLINES  
OF AN  
INTERNATIONAL CODE.

BY  
DAVID DUDLEY FIELD.

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*SECOND EDITION.*

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NEW YORK;  
BAKER, VOORHIS & COMPANY  
LONDON:  
TRÜBNER & COMPANY.  
1876.

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## PREFACE TO THE SECOND EDITION.

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IN the preface to the first edition I stated that "this work should be taken for what its name imports: the 'Draft Outlines of an International Code.' It is not put forth as a completed Code, nor yet as the completed outlines of a Code, but as a draft of the outlines. It is intended for suggestion, and is to undergo careful and thorough revision." Since that time I have had the advantage of many suggestions, and have given the work a careful revision. In doing so I have made various corrections in expression and some in substance, and have added provisions of considerable importance. Among these additions is a new chapter on international bills of exchange, a subject just now receiving a great deal of attention in Europe. The chapter on postal correspondence has been changed so as to make it conformable to the late postal treaty between the principal nations of Christendom. Provisions have also been introduced looking to the perpetual neutrality of the Suez Canal, to more stringent responsibility for shipwreck, and to greater security against collisions at sea. The word "draft" I have omitted from the title as no longer applicable. The numbering of the articles is the same as in the first edition, and when additional provisions are introduced, they are designated by letters of the alphabet.

As the work now stands, it aims to give a scheme of international law, such as publicists would recommend to

## PREFACE.

governments, and at the same time, by pointing out in the notes the difference between existing rules and those recommended, to show what the former really are at the present time.

A Code is a digest of law, moulded into distinct propositions, and arranged in scientific order. An international Code is an extended treaty. The late postal treaty is a Code as far as it goes, or rather one chapter of a Code. The fact that such a treaty has been made between sixteen different nations is proof that a general treaty can be made embracing one subject. Why may it not be made to embrace all, or, if not all, nearly all, subjects of international concern?

Since the first edition, several events of much significance in the history of international law have happened: the formation of two international societies for the study and improvement of the law of nations; the conference held at Brussels on the invitation of the Emperor of Russia, and the proposition of the government of Peru for a conference of the different states of North and South America.

The Institute of International Law was founded at Ghent, on the 10th of September, 1873. It is an exclusively scientific association, whose object is to favor the progress of international law, formulate its general principles, and give assistance to any serious endeavor for its gradual and progressive codification. The number of active members is limited to fifty. There have been two sessions since the first, one at Geneva, in September, 1874, and the other at the Hague, in August, 1875.

The Association for the Reform and Codification of the Law of Nations was founded at Brussels, on the 10th of October, 1873, and consists not only of jurists, but of men known as statesmen, economists, and philanthropists, with the view not only of adding its labors to those of the Institute, but of aiding by independent methods the reform and codifi-



## PREFACE.

cation of the law of nations, so as to promote pacific relations between the nations and the progress of international civilization. The two associations are really complements of each other.

The Brussels conference was called by the Emperor of Russia with a view to ameliorate the usages of war, or, to use an expression of an eminent French publicist, to promote "the civilization of war." The recommendations of the Conference are given in the appendix to this volume. The proposition of the government of Peru is also given in the appendix. I can not but express my regret that neither the invitation of the Emperor of Russia nor that of the government of Peru has been accepted by the government of the United States.

DAVID DUDLEY FIELD.

NEW YORK, July, 1876.



## PREFACE TO THE FIRST EDITION.

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THIS work should be taken for what its name imports : the "Draft Outlines of an International Code." It is not put forth as a completed Code, nor yet as the completed outlines of a Code, but as a draft of the outlines. It is intended for suggestion, and is to undergo careful and thorough revision. The present volume is but a part of the whole work. Another will appear in a few months, treating of the modifications in the relations of nations, and of their members, to each other, produced by a state of War.

The history of the undertaking is this : At the meeting of the British Association for the Promotion of Social Science, held at Manchester, in September, 1866, I ventured to propose the appointment of a committee to prepare and report to the Association the Outlines of an International Code, with the view of having a complete Code formed, after careful revision and amendment, and then presented to the attention of governments, in the hope of its receiving, at some time, their sanction. The proposition was favorably received, and a committee was appointed, consisting of jurists of different nations. In the distribution of the labor among the members of the committee a portion was assigned to me. It was at first understood that, after preparing their respective portions, the members should interchange them with each other, and then meet for the revision of the whole

and the completion of the joint production. But the distance of the members from each other has made it difficult for them to take note of each others' progress, and to interchange their respective contributions with advantage, previous to a general meeting, for consultation and revision. I have therefore thought it most convenient, for the other members of the committee as well as for myself, to present my own views of the whole work, by essaying a draft of the whole, hoping that my colleagues may do the same. However little my labors may be worth, I submit them, though with great diffidence, as my contribution to the general design.

The scheme embraced not only a codification of existing rules of international law, but the suggestion of such modifications and improvements as the more matured civilization of the present age should seem to require. The purpose was to bring together whatever was good in the present body of public law, to leave out what seemed obsolete, unprofitable or hurtful, and then to add such new provisions as seemed most desirable. The Code which the Association would propose is such an one as should win the commendation of good and wise men, for international regulations, in the interests of humanity and peace. With the view of aiding in the formation of such a Code, the present work has been undertaken. What in it is old will generally be found explained and justified by the notes; what in it is new is suggested for the consideration of those who think that much may yet be done by the authority of public law for the peace and prosperity of the world.

There will of course be found many omissions and many mistakes. In the progress of the work some provisions have been introduced which require a modification of earlier ones, but they will be readily perceived. Thus the word "league" was in some instances used to designate a measure of distance, before the details of the Title on "Weights and Measures" were fixed upon.



In the preparation of this volume I have had the assistance of several gentlemen, to whom I am under great obligations. I would especially mention President F. A. P. BARNARD, of Columbia College, who prepared the Titles on "Money," "Weights and Measures," "Longitude and Time," and "Sea Signals." I must acknowledge my indebtedness also to Messrs. AUSTIN ABBOTT, CHARLES FRANCIS STONE, and HOWARD P. WILDS, gentlemen of the New York Bar, who have greatly aided me in different parts of the work.

DAVID DUDLEY FIELD.

NEW YORK, January, 1872.



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### DIVISION FIRST. PUBLIC INTERNATIONAL LAW.

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# OUTLINES

OF AN

# INTERNATIONAL CODE.

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## PRELIMINARY ARTICLES.

- ARTICLE 1. Adopting Clause.
2. "Nation" defined.
  3. Use of the term "Nation" in this Code.
  4. Use of the term "Person" in this Code.
  5. "Member" defined.
  6. "Subject" and "Citizen" defined.
  - 7-11. Divisions of the Code.

### *Adopting clause.*

**Article 1.** The following rules are established and declared, by the nations assenting hereto, as an International Code, by which these nations, and their members, respectively, shall be governed in their relations with each other.

As to the extent to which existing special treaties may be abrogated, see *repealing clause*.

By another article any two nations may, by special treaty, modify the application of any of the provisions of the Code, as between themselves and persons and things subject to their exclusive jurisdiction.

A question may arise, how far the rules of this Code should be applied by the nations uniting in it to other nations and their members.

There is a large class of subjects, chiefly those known under the generic title of PRIVATE INTERNATIONAL LAW, in which the advantage of a uniform rule depends partly upon its being a rule resting not so much upon convention, binding only the nations which accede to it, as upon principles of jurisprudence, applicable in all courts, and proper to

be imposed upon persons of every nationality, without reference to the question whether the nations of which such persons are members have agreed in the adoption of the rule. The provisions of Division Second of Book First are of this general nature. It may be a question, therefore, whether the application of that Division ought to be restricted to the nations uniting in the Code, and to the members of such nations. When, for instance, a question arises as to the right of a foreigner to hold real property, or to reclaim a wreck, or to claim for his ship the privileges of a domestic ship, the provisions of the First Division will be found not to apply, unless he be a member of a nation uniting in the Code. But, if the question arises in any of the courts of the nations uniting in the Code, whether a foreign marriage or divorce is valid; whether a foreign contract is to be judged by the law of one place, or that of another; or a question upon any other of the rules contained in Division Second, it may be thought that the rules prescribed by the Code should be applicable, without reference to the nationality of the parties. The inconvenience or incompleteness of a rule on such subjects of private right, which should be applicable to the transaction, so far only as it might affect the interests of foreigners of certain nationalities, but not so far as to affect those of the members of the nation or of foreigners generally, is obvious. If it were desired to give these rules such a general character as would, so far as the courts of the assenting nations are concerned, solve and terminate the Conflict of Laws, the following clause might be added to Article 1;—

And the provisions of Division Second of Book First, entitled PRIVATE INTERNATIONAL LAW, are to be applied, in each nation which is a party to this Code, not only to foreigners who are members of nations parties to the Code, but also to their own members, and to foreigners of whatever nation, except where a more restricted intention appears.

*“Nation” defined.*

2. A nation is a people permanently occupying a definite territory, having a common government, peculiar to themselves, for the administration of justice and the preservation of internal order, and capable of maintaining relations with all other governments.

1 *Phillimore's International Law*, p. 77; 1 *Kent's Commentaries*, 188. And see *Texas v. White*, 7 *Wallace's U. S. Supreme Court Reports*, 700. *Bluntschli*, (*Droit International Codifié*, Art. 18,) adds the restriction that sufficient guaranties of stability should be indicated.

A people whose government is not independent, but vassal,—such as that of Egypt,—or incapable of maintaining international relations,—such as those of the States of the American Union,—and a people occupying no definite territory,—such as nomadic tribes in Asia and Africa,—or having abandoned one territory to take possession of another,—as in the case of the Mormon emigration,—are not *nations*, within the provisions of this Code; although they may be regarded as such for some

purposes, and the two latter classes may make treaties. *Bluntschli, Dr. Intern. Cod.*, §§ 21, 22.

*Austin, (Province of Jurisprudence, p. 199, cited by Lawrence, (Com-mentaire sur Wheaton, p. 155,)* prefers to use the term in an ethnologic sense; and designates an independent political body as a "State." But the word "State" is by frequent usage appropriate to designate a political body not independent; and the term "nation" seems preferable for that which is independent. A nation is here defined as it exists as a political fact. For an eloquent discussion of the element of liberty or spontaneity in the right of nationality, see *Fiore, Nouveau Droit International*, par Pradier-Fodéré, vol. 1, ch. 1, p. 97, and note on page 119. Fiore defines a nation thus: "Une libre et spontanée association de personnes qui, par "communauté du sang, de langue, d'aptitude, par une affinité de vie civ-  
"ile, de temperament, de vocation, sont aptes, et predisposées à la plus  
"grande union sociale."

As to the exceptional case of Indian or other subordinate tribes, within the territory of a nation, but having a quasi national existence of their own, see *Cherokee Nation v. Georgia*, 5 *Peters' U. S. Supreme Court Reports*, 1; *Mackey v. Coxe*, 18 *Howard's U. S. Supreme Court Reports*, 100; *Goodell v. Jackson*, 20 *Johnson's Reports, (New York,)* 693, and 188; *Lawrence, Com. sur Wheaton*, 264.

*Use of the term "nation" in this Code.*

3. Whenever the word "nation" is hereafter used in this Code, it signifies only a nation party to it, except when an intention to signify any nation whatever is expressed.

*Use of the term "person" in this Code.*

4. Whenever the word "person" is used, it signifies only a person who is a member, or subject to the jurisdiction of, one of the nations, except when an intention to signify any person whomsoever is expressed.

*"Member" defined.*

5. A member of a nation is a person who, according to the rules prescribed in the chapter on NATIONAL CHARACTER OF PERSONS, is one of the people composing such nation.

*"Subject" and "citizen" defined.*

6. The members of a nation in which the sovereign power is vested in a particular person or persons, are

called subjects ; the members of a nation in which the sovereign power is vested in the people, are called citizens.

*Divisions of the Code.*

**7.** This CODE is divided into two BOOKS.

The first treats of the relations of nations and of their members to each other, except as they are modified by a state of war.

The second treats of the modifications in the relations of nations and of their members to each other, produced by a state of war.

*The same.*

**8.** The FIRST BOOK has two DIVISIONS.

The first Division, entitled PUBLIC INTERNATIONAL LAW, contains the rules respecting the relations of nations to each other and to the members of other nations.

The second, entitled PRIVATE INTERNATIONAL LAW, contains the rules respecting the relations of the members of a nation to the members of other nations.

*The same.*

**9.** The FIRST DIVISION of the FIRST BOOK has four PARTS.

The first Part concerns the *relations of nations to each other*.

The second concerns the *relations of a nation to the persons and property of members of other nations*.

The third contains provisions intended solely for the *mutual convenience* of nations and of their members.

The fourth contains provisions intended solely for the *preservation of peace*.

*The same.*

**10.** The SECOND DIVISION of the FIRST BOOK has two PARTS.



The first Part defines the private *rights of persons*,<sup>1</sup> as affected by the relations of nations.

The second regulates the *administration of justice* in respect to such rights.

<sup>1</sup> Perhaps this should be all persons whatsoever ; see note to Article 1.

*The same.*

**11.** The SECOND BOOK has three DIVISIONS.

The first Division treats of *belligerents* ;

The second of *allies* ;

The third of *neutrals*.



# BOOK FIRST.

## PEACE.

DIVISION FIRST. PUBLIC INTERNATIONAL LAW.  
SECOND. PRIVATE INTERNATIONAL LAW.

---

### DIVISION FIRST. PUBLIC INTERNATIONAL LAW.

- PART I. RELATIONS OF NATIONS TO EACH OTHER.  
II. RELATIONS OF A NATION TO THE PERSONS AND PROPERTY OF THE MEMBERS OF OTHER NATIONS.  
III. UNIFORM REGULATIONS FOR MUTUAL CONVENIENCE.  
IV. PROVISIONS FOR THE PRESERVATION OF PEACE.
- 

### PART I. THE RELATIONS OF NATIONS TO EACH OTHER.

- TITLE I. ESSENTIAL RIGHTS.  
II. EXTRA-TERRITORIAL ACTION.  
III. INTERCOURSE.  
IV. INTERNATIONAL COMPACTS.  
V. REMOVAL OF PERSONS.
-

## TITLE I.

## ESSENTIAL RIGHTS OF NATIONS.

- CHAPTER I. Sovereignty.  
 II. Equality.  
 III. Perpetuity.  
 IV. Territory  
 V. Property and Domain.

The right of a nation to protect its members is not separately treated because, its authority, within the national jurisdiction, is sufficiently recognized in Part II. ; while the rights of members beyond the jurisdiction as defined by various provisions of the Code, are to be peacefully enforced under Part IV.

## CHAPTER I.

## SOVEREIGNTY.

- ARTICLE 12. "Sovereignty" defined.  
 13. Foreign powers not entitled to act within a nation.  
 14. Sovereignty, how vested.  
 15. Sovereign or chief officer not subject to other jurisdiction.

*"Sovereignty" defined.*

12. Every nation is sovereign within its own jurisdiction ; that is to say, it is, of right, independent of all foreign interference, and free to express and enforce its will, by action within its jurisdiction, without opposition from any foreign power.

The independence and liberty thus enjoyed by each nation are not absolute, but are limited by the equal freedom and independence of others, by the provisions of this Code, and by the special compacts to which the nation is a party.

See *Lawrence's Wheaton*, 132 ; 1 *Wildman, Int. Law*, 47 ; 1 *Phill. Intern. Law*, 164 ; *Lawrence, Com. sur Wheaton*, p. 161.

Bluntschli enumerates the following rights as included in the sovereignty of a nation :

1. To make its own constitution ;

2. To legislate independently for its people and territory ;
3. To govern and administer itself ;
4. To choose its own officers ;
5. To appoint and accredit its representatives to foreign nations.

*Piore, Nouv. Dr. Int.* (ch. II. pt. I.) lays stress on the right of organization as the central element of internal sovereignty, and this is the American doctrine.

The right of self-preservation is evidently inherent in that of sovereignty, but it seems unnecessary to define it. If it were to be defined, it might perhaps be in such mode as follows :

Every nation has the right of self-preservation : to be made effectual within its territorial jurisdiction by any means which its sovereignty can exercise ; and beyond its jurisdiction, by such means as are consistent with the provisions of this Code, and of its own special compacts. *Ortolan, Règles Int. et Dipl. de la Mer*, vol. 1, p. 50.

*Foreign powers not entitled to act within a nation.*

**13.** No nation is bound to tolerate the performance, within the places subject to its exclusive jurisdiction, as defined by Title VIII., of any act, official or unofficial, of any other nation, except such as is provided for by this Code, or by special compact.

*Bluntschli, Dr. Int. Cod.*, § 69.

*Sovereignty, how vested.*

**14.** The sovereignty of a nation may be vested in one or more persons, or in the whole people, according as its law may direct.

*Sovereign or chief officer not subject to other jurisdiction.*

**15.** The sovereign or chief executive officer of a nation is never subject to the jurisdiction of any other nation, either in his person or property,<sup>1</sup> except as follows :

1. To the same extent with his nation in its collective capacity ; and,

2. In his private capacity, to the jurisdiction of any nation of which he is a member.<sup>2</sup>

<sup>1</sup> 2 *Phill. Intern. Law*, 120 ; *Wadsworth v. Queen of Spain*, 17 *Queen's Bench Rep.*, 171.

<sup>2</sup> *Brunswick v. Hanover*, 6 *Beavan's Rep.*, 1.

## CHAPTER II

## EQUALITY.

ARTICLE 16. Equality in rights and rank.

17. National emblems.

*Equality in rights and rank.*

16. All nations are equal in rights.<sup>1</sup> No distinction in rank between them is permitted;<sup>2</sup> and wherever, in treaties or other official acts, two or more of them are named in juxtaposition, they shall be named in alphabetical order, according to the first letter of their names, respectively, as expressed in the French language, except that each nation may have its own name first in the document which it retains.<sup>3</sup>

<sup>1</sup> 1 *Kent's Com.*, 21; *Kläber, Droit des Gens*, § 89.

<sup>2</sup> As to the existing distinctions which would be abrogated as matter of right by this rule, see *Bluntschli*, §§ 84-98; *Ortolan, Règles Int. et Dipl. de la Mer*; *Fiore, Nouv. Dr. Int.*, vol. 1, p. 278.

<sup>3</sup> *Treaties of Vienna*, 1815.

*National emblems.*

17. No nation has a right to appropriate to itself the emblems, title, coat of arms, flags, signals, or uniform, in use and previously appropriated by another nation.

*Bluntschli, Droit Intern. Cod.*, § 82

## CHAPTER III.

## PERPETUITY.

ARTICLE 18. Diminution of territory or population.

19. Change in form of government or in dynasty.

20. Anarchy.

21. Double crown.

22. Annexation of one nation to another.

23. Cession or other annexation of part of territory.

24. Division of a nation.

25. Apportionment of property

26. Apportionment of debts.

*Diminution of territory or population.*

18. Diminution of the territory or population of a

nation does not affect its existence, so long as its people have a territory and government, such as is described in article 2. Nor does it affect the rights and obligations of the nation in respect to other nations and their members, except so far as such rights or obligations are necessarily dependent on the territory or population lost.

Suggested by *Bluntschli, Dr. Int. Cod.*, §§ 47-50.

*Change in form of government or in dynasty.*

**19.** A change in the form of its government, or in its dynasty, does not affect the continuity of existence of a nation, or its property, nor does it affect its rights or obligations in respect to other nations or their members,<sup>1</sup> except so far as such rights or obligations are necessarily dependent on the continuance of the old form of government<sup>2</sup> or dynasty.

*Lawrence's Wheaton*, 39, 52; *Halleck's Int. Law*, p. 77; 1 *Wildman's Int. Law*, 68; 1 *Phill. Int. Law*, 148; 1 *Kent's Com.*, 25. And see *Bluntschli*, §§ 39-45; and *King of Two Sicilies v. Wilcox*, 1 *Simons' Rep.*, (N. S.,) 301.

<sup>1</sup> This rule is especially important in its application to national debts. The only questions of real difficulty, arising under the general rule, are those which spring out of insurrections. These are treated in the second Book.

The *King of the Two Sicilies v. Wilcox*, 1 *Simons' Rep.*, (N. S.,) 301, establishes the principle that where a *de facto* government has, as such, obtained possession of property, the government which displaces it succeeds to all its rights.

<sup>2</sup> For instance, a compact between two republics to protect each other in a republican form of government, would be terminated by the final establishment of a monarchy in one or both.

*Anarchy.*

**20.** A temporary condition of anarchy does not affect the continuity of existence of a nation.

*Bluntschli*, § 19. As to the effect of a *restoration* upon the acts of the revolutionary government, see *Id.*, §§ 44, 45; *Lawrence's Com. sur Wheaton*, p. 214, &c.

*Double crown.*

**21.** When one nation chooses, or receives by succession, as its sovereign, the sovereign of another nation, it does not thereby lose its independent existence,

or its separate relations with other nations, unless it be so provided by the terms of union.

*Bluntschli*, §§ 51, 75.

*Annexation of one nation to another.*

**22.** Where one nation is annexed to another, so as to form part thereof, the latter, by the act of annexation, acquires all the rights and becomes bound to fulfill all the obligations of the former.

This obligation was fully recognized by the new kingdom of Italy, upon annexing a number of States to Piedmont. Such, also, has been the universal practice where entire States have been annexed by conquest. The United States of America, on annexing the Republic of Texas in 1845, with the consent of the latter, disclaimed all liability for the Texan debt. (See *Lawrence, Com. sur Wheaton*, p. 211.) The question never arose in any diplomatic negotiation; but the claims of the creditors of Texas were felt to be so strong that the United States eventually provided means for their payment, (September, 1850; 5 *U. S. Stat. at Large*, 797; 10 *Id.*, 617,) without acknowledging any liability, but as part of an agreement by which Texas renounced its claims to certain boundaries.

As to the effect of treaty stipulations, see *Lawrence, Com. sur Wheaton*, p. 210.

*Cession or other annexation of part of territory.*

**23.** Where part of the territory of one nation is annexed, by cession or otherwise, to the territory of another, the latter nation, by the act of annexation, acquires all the rights and becomes bound to fulfill all the obligations which pertained to the former nation, in respect of the territory acquired and its inhabitants and the property therein,<sup>1</sup> but no others.<sup>2</sup>

<sup>1</sup> See note to last article; *Bluntschli*, § 47.

<sup>2</sup> *Id.*, § 48.

*Division of a nation.*

**24.** Where a nation is, from any cause, divided into two or more, each portion, by the act of division, acquires all the rights and becomes bound to fulfill all the obligations, which pertained to the original nation, in respect of the territory in which such portion is situated, or in respect of its inhabitants, and the property therein.



And except as otherwise provided in the three following articles, all other divisible rights and obligations must be so apportioned that each portion of the divided nation shall have that share which it would have had without the division ; and, until such apportionment, the whole of such rights and obligations adhere to each portion in common with the other portion or portions.

See 1 *Phill. Int. Law*, 157 ; *Halleck*, 78 ; 1 *Kent's Com.*, 25, 26 ; *Terret v. Taylor*, 9 *Cranch's U. S. Supreme Ct. Reports*, 50 ; *Bluntschli*, § 49.

*Apportionment of property.*

25. Where a nation is, from any cause, divided into two or more, its property is to be apportioned as follows, unless otherwise agreed :

1. Immovables, appropriated to public use, such as public buildings and establishments, and charitable and religious houses, pass to the portion of the nation holding the territory in which they are situated ; and such portion is not bound to make compensation to the other therefor, except where the property served the uses of the population of the other, and they incur new expenses to supply its loss :

2. Ships of war, arms, equipments and munitions, military and naval, must be divided in proportion to the population :

3. Public lands, other than those provided for by subdivision 1 of this article, the public funds, and in general, such national property as serves only indirectly the objects of public utility, form a common fund, which must be divided in proportion to the population, with this qualification, that immovables must always be appropriated to the portion in whose territory they are situated, and their value considered in the partition.

See *Bluntschli*, §§ 56-58.

*Apportionment of debts.*

26. Where a nation is, from any cause, divided into two or more, each portion has the right to have the debts of the original nation provided for from the prop-

erty of the original nation ; and debts not so provided for must be apportioned in proportion to the revenues raised in the different portions of the territory.

*Bluntschli* (§ 59) makes the debts secured by mortgage or hypothecation of immovables rest on that portion of the nation which takes the immovables. It is suggested, as a fairer rule, that the common debts be first provided for out of the common property.

## CHAPTER IV.

### TERRITORY.

#### ARTICLE 27. "Territory" defined.

28. Boundary by the sea.
29. Adjacent islands.
30. Boundary by a stream or channel.
- 31, 32. Boundary by inland lakes, &c.
33. Wilderness.
34. Power to determine boundaries.
35. Exception.
36. Injuring boundaries, marks or monuments.
37. Loss of territory, and acquisition of territory.
38. Acquisition by occupation.
- 39, 40. Extent of occupancy.
- 41-43. Accretion.
44. Reclaiming land washed away.
45. Ownership of islands.
46. Changes of stream.
47. Transfer or cession.
48. Conquest.

#### "Territory" defined.

27. The territory of a nation is the land and water which it possesses, or has a present right to possess, as defined and limited by actual and peaceful occupation, by special compact, or by the provisions of this Code.

Territory is here used in the sense of sovereignty and jurisdiction, and not in the sense of property ; and therefore it is limited by occupation. *Ortolan* (*Règles Int. et Dipl. de la Mer.*) distinguishes between : (1.) Ports and Roadsteads ; (2.) Gulfs and Bays ; (3.) Straits and closed Seas ; (mers enclaves ;) and (4.) Parts of the Sea adjacent to the coasts within a certain

distance. In respect of the first, he says a nation has a right of property, and may declare them closed, treating, however, all nations alike. The same rule he applies also to gulfs, &c., the mouths of which are not more than double cannon-shot across, or are protected by forts or islands. But this principle seems to extend to the waters bordering the coast; and no distinction is therefore recognized in the above article and article 51.

During the Franco-Prussian war, (1870,) the American government objected to the hovering of armed vessels off the coast, awaiting the exit from American ports of merchant vessels of the enemy.

The quasi-territorial jurisdiction over land and water within the lines of an army or fleet, beyond the ordinary territorial limits, is provided for in Title VIII., on NATIONAL JURISDICTION.

### *Boundary by the sea.*

**28.** The limits of national territory, bounded by the sea, extend to the distance of three marine leagues<sup>1</sup> outward from the line of low-water mark; and where bays, straits, sounds, or arms of the sea,<sup>2</sup> are inclosed by headlands not more than six leagues apart,<sup>3</sup> such limits extend three leagues outward from a line drawn between the two headlands.

<sup>1</sup> Inasmuch as cannon-shot can now be sent more than two leagues, it seems desirable to extend the territorial limits of nations accordingly. The ground of the rule is, the margin of the sea within reach of the land forces, or from which the land can be assailed.

<sup>2</sup> *Mahler v. Transportation Company*, 35 *New York Rep.*, 352; *Lawrence's Wheaton*, p. 320; *Vattel's Law of Nations*, 130; *Hautefeuille, Droit des Nations Neutres*, (2nd ed.,) 89. See *Church v. Hubbard*, 2 *Cranch U. S. Sup. Ct. Rep.*, 187, 235. *Bluntschli* (§ 303) says that where the sea boundaries of adjacent nations overlies each other, each nation is bound to respect the sovereignty of the other on the common area. Such cases are provided for in articles 30, 31 and 32.

<sup>3</sup> It is believed that no definite rule has heretofore been laid down on this point. See *Halleck's Int. Law*, p. 132; *Lawrence's Wheaton*, p. 322. The distance between the headlands of Delaware Bay is about fifteen miles.

### *Adjacent islands.*

**29.** Islands in the sea, beyond the distance specified in the last article, are presumed to be part of the territory of the nation possessing the adjacent main land.

*Halleck*, p. 131, § 15. The limit of distance seems to be necessarily indefinite. Islands newly formed by accretion are provided for in articles 41 and 45.

*Boundary by a stream or channel.*

**30.** The limits of national territory, bounded by a river or other stream, or by a strait, sound, or arm of the sea, the other shore of which is the territory of another nation, extend outward to a point equidistant from the territory of the nation occupying the opposite shore; or if there be a stream or navigable channel, to the thread of the stream, that is to say, to the mid-channel; or, if there be several channels, to the middle of the principal one.

“Thalweg.” *Bluntschli*, § 298. *French treaties*.

The right to the use of the whole river or bay, for navigation, &c., is nevertheless an easement or servitude common to both nations. *The Fame*, 3 *Mason's U. S. Circuit Ct. Reports*, 147. See art. 55 below.

*Boundary by inland lake, &c.*

**31.** The limits of national territory, bounded by a lake, or other inland water, not being a stream, extend outward to a straight line drawn from the points at which such territory touches the land of other nations on the shore, at low-water mark; except where such line would fall within less than three marine leagues of the shore of another nation.

*The same.*

**32.** Where the line mentioned in the last article would fall within less than three marine leagues of the shore of another nation, at low-water mark, it must so deflect as to run that distance from such shore, unless the distance between the opposite shores is less than six marine leagues, in which case the boundary line runs equidistant from the two shores.

*Wilderness.*

**33.** Where two nations have settled upon the same continent without intervening settlements, and no large stream or body of water, or range of mountains intervenes between their settlements, the boundary between them is presumed to be equidistant from the nearest settlements; but, where there is such water or mountain range, the one which is most nearly equidistant

from such settlements is presumed to be the boundary.

<sup>1</sup> *Phill. Intern. Law*, 251-254. See *Bluntschli*, § 297.

*Powers to determine boundaries.*

**34.** Coterminous nations have jurisdiction jointly to determine and establish the boundaries between their respective territories ;<sup>1</sup> and it is their duty to do so, and to mark the same clearly.<sup>2</sup>

<sup>1</sup> *Poole v. Fleegeer*, 11 *Peters' U. S. Sup. Ct. Rep.*, 185 ; *Latimer v. Po-teet*, 14 *Id.*, 4.

<sup>2</sup> *Bluntschli*, § 296.

*Exception.*

**35.** The foregoing provisions as to boundaries do not apply where the boundary is otherwise defined by special compact.<sup>1</sup>

<sup>1</sup> A boundary agreed upon by the collectors of revenue can not be regarded as valid. *The Fame*, 3 *Mason's U. S. Circ. Ct. Rep.*, 147.

*Injuring boundaries, marks, or monuments.*

**36.** Willfully removing, concealing, injuring or falsifying any monument, mark or sign, made or adopted by the concurrence of two or more nations for indicating a boundary between them, is a public offense.

The regulations between France and the Grand Duchy of Luxembourg, Oct. 15, 1853, for preservation of boundary marks, (6 *De Clercq*, 386, Art. XI,) provides : that, offenders are to be prosecuted and judged according to the law of the State in which they are found ; and that, for this purpose, proceedings had in either State shall, as far as necessary, have equally "*foi en justice*" in the other.

*Loss of territory, and acquisition of territory.*

**37.** A nation may lose territory :

1. By abandonment ;
2. By destruction ;
3. By transfer ; or,
4. By conquest.

A nation may acquire territory :

1. By occupation ;
2. By accession ;
3. By transfer ; or,
4. By conquest.

No provision is made for devise or succession after death, inasmuch as the devise of a crown can not be deemed to destroy the identity of the State; and the power of a monarch to alienate any part of the national territory by will should not be admitted.

*Acquisition by occupation.*

38. Territory can be acquired by occupation, in the following cases only :

1. When it was previously unoccupied by any other than a savage nation ;

2. When the nation which previously occupied it has, without ceding it, renounced the sovereignty which it exercised over it, either expressly, or by abandoning the territory ; or,

3. When the inhabitants of the territory overthrow their government and freely join themselves to the occupying nation.

*Extent of occupancy.*

39. Occupancy of any part of an island uninhabited or inhabited only by savages, is presumed to be an occupancy of the whole.

*The same.*

40. A nation is presumed to occupy all territory within the limits over which it maintains an effective control ; and such presumption is conclusive, unless it appears that some other nation actually occupies a portion of such territory.

*Accretion.*

41. Land formed in the sea by accretion belongs to the nation whose territory is nearest.

1 *Phill. Int. Law*, 257 ; *The Anna*, 5 *Robinson's Adm. Rep.*, 332 ; *Bluntschli*, § 295, note.

*The same.*

42. When land is formed on the shore from natural causes and by imperceptible degrees, the boundary between the nation owning it and the nations owning other parts of the shore is modified so as to conform to the change in the shore.

This and the two following articles are suggested by the *Code Napoleon*, Liv. II., Tit. II., Art. 556-559; and *Civil Code* reported for *New York*, §§ 443-448.

*The same.*

**43.** When land is formed on the shore from artificial causes or by perceptible degrees, the boundary between the adjoining nations is not changed thereby.

*Reclaiming land washed away.*

**44.** If a considerable and distinguishable part of the shore is carried away by the water, to a place within the boundaries of another nation, the nation owning it while attached to the shore may reclaim it within one year, if it can be restored to the territory of the nation so claiming it; but until it is so restored it must be deemed to be part of the territory within which it is situated.

*Ownership of islands.*

**45.** An island, formed from natural causes in any water other than the sea, belongs to the nation within whose boundary it is formed; or, if it is formed upon the boundary of two or more nations, each nation owns so much of the island as lies within its original boundary.

Compare *Bluntschli*, § 295.

*Changes of stream.*

**46.** If a stream which constitutes the boundary between two or more nations forms a new course, abandoning its ancient bed, from natural causes, and by imperceptible degrees, the boundary follows the center of the stream, as defined in article 30; but in other cases the boundary remains in the center of the ancient bed.

1 *Phill. Int. Law*, 258, 259; *Bluntschli*, § 299.

*Transfer or cession.*

**47.** Territory can be acquired by transfer or cession, upon the agreement of the nations whose sovereignty is affected by the transaction.

Acquisition by transfer or cession is imperfect, until possession is taken by the nation receiving the transfer.

Compare *Bluntschli*, §§ 282, 296. He adds, that to make a cession valid, the inhabitants of the ceded territory must recognize the cession, and have the enjoyment of their political rights under the nation receiving the transfer.

### *Conquest.*

**48.** Conquest includes any mode of obtaining possession of territory against the will of the power by which it was previously occupied.

Acquisition by conquest becomes complete by the permanent continuance of peaceful possession.

See *Bluntschli*, § 290.

## CHAPTER V.

### PROPERTY AND DOMAIN.

**ARTICLE 49.** Capacity to have property.

50. Eminent domain.

51. Internal domain.

52. Prescription.

### *Capacity to have property.*

**49.** Subject to its constitution and laws,<sup>1</sup> a nation has capacity to acquire, hold and dispose of:

1. Property<sup>2</sup> not within the territorial limits of any other nation; and,

2. With the consent of any other nation, property within the territorial limits of such other nation.

<sup>1</sup> The capacity to acquire real property may be limited or regulated by the organic law.

<sup>2</sup> The property of a nation is of two kinds :

1st. Public property or public domain ; that is, that kind which the government holds as a mere trustee for the use of the public ; such as navigable rivers, highways, &c. ; and,

2nd. Private domain or domain of the State ; that is, those things in which the nation has the same absolute property as an individual would have in like cases. *Halleck*, p. 123.



*Eminent domain.*

50. The power of a nation, by virtue of eminent domain, to take, or suspend the use of,<sup>1</sup> property within its territorial limits, for the public use, safety or welfare, extends to the property of foreign persons, states and nations.

Adequate compensation<sup>2</sup> must be made therefor, and, except in cases of immediate necessity, at the time of the interference.

<sup>1</sup> By several treaties, the property of a foreigner can not be taken, or his use thereof impeded or impaired by public authority, without adequate compensation for the interference.

## Treaty between France and

Honduras,	February 22, 1856, Art. VII., 7 <i>De Clercq</i> , p. 10.
New Grenada,	May 15, 1856, " VI., 7 <i>Id.</i> , 102.
Nicaragua,	April 11, 1859, " VII., 7 <i>Id.</i> , 586.
Peru,	March 9, 1861, " V., 8 <i>Id.</i> , 193.

## Treaty between the United States and

Bolivia,	May 13, 1858, Art. III., 12 <i>U. S. Stat. at L.</i> , 1003.
Nicaragua,	June 21, 1867, " IX., 15 <i>Id.</i> , ( <i>Tr.</i> ) 59.

The detention of a vessel in port by the President of the United States under the Act of Congress, April 30, 1818, (3 *U. S. Stat. at L.*, 447,) was held not a taking and use of private property for public purposes, within the meaning of the Constitution; but an arrest by due process of law. Court of Claims, 1866, *Graham v. United States*, 2 *Court of Claims Rep.*, *Nott & H.*, 327. Some of the treaties expressly require compensation in case of embargo, &c.; and the article, above, is accordingly extended to interferences with the use of property.

<sup>2</sup> Articles condemned for violation of law, or because of adaptation to illegal uses,—*e. g.*, burglars' tools, obscene publications, &c.,—are not to be regarded as property within such a rule as this.

*Internal domain.*

51. As against other nations, a nation is presumed to be the owner of all public, and all unappropriated, property within its territorial limits,<sup>1</sup> and has a right to forbid any other nation from owning or holding any property within such limits, except as otherwise provided in this Code,<sup>2</sup> or by special compact.

<sup>1</sup> See *Fiore, Nouv. Dr. Int.*, vol. 1, Lib. 2, chs. 1, 2; *Lawrence's Wheaton* p. 303, § 3.

<sup>2</sup> See Chapter VI., on NAVIGATION.

*Prescription.*

**52.** The uninterrupted possession of territory or other property for fifty years by a nation, excludes the claim of every other nation.

Perscription is applicable to the title to national property. *Rhode Island v. Massachusetts*, 4 *Howard's U. S. Sup. Ct. Rep.*, 639; *Lawrence's Wheaton*, p. 303, § 4.

*Vattel* suggests the propriety of fixing by agreement of nations a definite rule as to the number of years necessary to found a prescription. *Law of Nations*, B. 2, c. 11, § 151.

*Phillimore* questions the expediency and the possibility of so doing. *Int. Law*, Vol. 1, p. 272, note r.

Compare *Dana's Wheaton*, § 164, note 101.

## TITLE II.

## EXTRA-TERRITORIAL ACTION.

- CHAPTER VI. Navigation.  
 VII. Discovery.  
 VIII. Exploration and Colonization.  
 IX. Fisheries.  
 X. Piracy.
- 

## CHAPTER VI.

## NAVIGATION.

- ARTICLE 53. Freedom of the "high seas."  
 54. Navigation of the high seas and other waters.  
 55. Rivers communicating with the sea.  
 56. Inland waters.  
 57. Menacing armaments.  
 58. Military ports.  
 59. Public vessels may refit in port.  
 60. Restrictions.  
 61. False colors and signals.  
 62. Right of approach.  
 63. "Visitation" defined.  
 64. Right of visitation.  
 65. Visitation on the high seas.  
 66. Mode of visitation.  
 67. Salutes.  
 68. Searches forbidden.  
 69. Flag and documents.

*Freedom of the "high seas."*

53. The high seas are the ocean, and all connecting arms and bays or other extensions thereof, not within the territorial limits of any nation whatever.

No part of the high seas is the subject either of property, or of exclusive jurisdiction.<sup>1</sup>

<sup>1</sup> Ortolan, *Règles Int. et Dipl. de la Mer*, v. 1, pp. 112, 120.

*Navigation of the high seas and other waters.*

54. The right to navigate the high seas and all other navigable waters not within the territorial limits of any nation whatever,<sup>1</sup> is common to all nations and their members; and except as provided in this Code, can be abridged or renounced only by actual consent.<sup>2</sup>

<sup>1</sup> See *Ortolan*, above cited; and *Bluntschli*, §§ 304-307, 314, 316.

<sup>2</sup> 1 *Phill. Int. Law*, § CLXXIV.; *Heffter*, § 74, p. 148.

Doubted by *Hauteville*, *Droit des Nations Neutres*, v. 1, p. 222. As to tacit consent arising from disuse, see *Lawrence's Wharton*, 339-346, § 10.

*Rivers communicating with the sea.*

55. A nation, and its members, through the territory of which runs a navigable river, have the right to navigate the river to and from the high seas, even though passing through the territory of another nation, subject, however, to the right of the latter nation to make necessary or reasonable police regulations for its own peace and safety.

Message of President Grant to the Congress of the United States, December, 1870; and treaties there cited.

*Inland waters.*

56. The right to navigate inland waters not communicating with the ocean by a natural channel, is common to every nation, whose territory borders thereon, and to its members.

*Bluntschli*, *Droit International Codifié*, § 316; 1 *Phill. Int. Law*, § CCIV.

See provisions as to RIGHTS OF OCCUPATION, in the articles of Section II. of Chapter XXV., entitled PERSONAL RIGHTS OF FOREIGNERS.

*Menacing armaments.*

57. A nation may refuse to allow menacing armaments of another nation to enter or remain within its territorial limits.

*Ortolan*, *Rég. Int. et Dipl. de la Mer*, vol. 1, pp. 143, 145.

Some treaties fix a number as a limit,—three, four, five, or six ships at a time.

*Military ports.*

58. A nation may refuse to allow public or private ships of another nation to enter its purely military ports.

*Ortolan*, *Rég. Int. et Dip. de la Mer*, vol. 1, p. 145.

*Public vessels may refit in port.*

59. Subject to the last two articles, public ships of one nation, whether armed or unarmed, and private ships, may enter, remain and refit in any port of another, which is open to the commerce of any nation whatever.

Suggested by treaty of friendship, commerce and navigation between France and San Salvador, January 2, 1858, Art. XVII., 7 *De Clereq*, 362. Qualifications in the case of war are contained in Book Second of this Code.

*Restrictions.*

60. The right of navigation must be exercised subject to the regulations for avoiding collisions, usually observed by ships where it is exercised,<sup>1</sup> and those prescribed by Chapter XXXII., entitled RULES OF NAVIGATION, [LAW OF THE ROAD AT SEA,] and subject to such reasonable police and military regulations in respect of the territorial waters of another nation, as the latter may prescribe,<sup>2</sup> and subject also to Chapter X., relative to PIRACY.

<sup>1</sup> *Bluntschli*, §§ 330-332. This has been lately held by Judge Blatchford, American Admiralty Judge in 6th District.

See, to the contrary, the Saxonia, *Lushington's Rep.*, 414; 15 *Moore's Privy Council Rep.*, (N. S.,) 682.

<sup>2</sup> *Dana's Wheaton*, § 180, note 108. The practice of America and England authorizes seizures for revenue offenses, etc., beyond this limit. 1 *Phill. Int. Law*, § CXCVII.

*False colors and signals.*

61. The displaying of false colors, or the making of false signals by a ship, with intent to mislead any ship, public or private, of another nation, is a public offense.

*Ortolan, Rég. Int. et Dip. de la Mer*, vol. 1, p. 254.

*Right of approach.*

62. A ship, whether public or private, has a right to approach another on the high seas, if it can, and to hail or speak it, and to require it to show its colors; the approaching ship first showing its own.

*Ortolan, Rég. Int. et Dip. de la Mer*, vol. 1, p. 233, &c.

“ *Visitation* ” defined.

63. “ *Visitation* ” is the boarding of a ship.

*Right of visitation.*

64. No ship is subject to visitation by a ship of another nation,<sup>1</sup> except in the following cases :

1. A private or other unarmed ship within the territorial limits of the nation by whose public ship the visitation is made ;<sup>2</sup>

2. On the high seas, in the cases provided in the next article.<sup>3</sup>

<sup>1</sup> *Ortolan* above cited ; *Fiore, Nouv. Dr. Int.*, vol. 2, p. 489, &c. ; *Hallick, Int. Law*, p. 593, § 1. See *Lawrence's Wheaton*, pt. 4, ch. 3, § 18.

<sup>2</sup> The territorial limits would be extended by article 28, to three marine leagues ; and it does not seem necessary to recognize the right of pursuit beyond that distance.

<sup>3</sup> The effect of these rules would be to require ships to show their true colors at sea, and to allow armed ships to visit in case of a breach of this rule, confining the visitation, however, to the purpose of ascertaining the character of the offender, and its identity. See the subject discussed in *Ortolan, Règles Int. et Dipl. de la Mer*, vol. 1, p. 233, &c.

Visitation in time of War is provided for in Book Second.

*Visitation on the high seas.*

65. If a private or other unarmed ship, being upon the high seas, not under convoy of an armed ship of its nation,<sup>1</sup> does not show its colors in response to an armed ship of another nation duly requiring it, or if there be probable cause for believing that it shows false colors with intent to mislead an armed ship of another nation, it may be compelled to submit to visitation.

<sup>1</sup> The presence of the convoying ship is a sufficient assurance of nationality. *Wildman, Int. Law*, vol. 2, p. 121. Perhaps this should be extended to armed ships ; and if so, the clause as to convoy should be omitted.

*Mode of visitation.*

66. In the case of a visitation upon the high seas, the visiting ship must give distinct and intelligible warning of its visit.<sup>1</sup> If a gun be fired, warning must first be given by a blank shot, and then, after reasonable opportunity for submission, by a shot ahead ;<sup>2</sup> and no more force must be used than is necessary to

ascertain the nationality and the identity of the offending ship.<sup>3</sup>

<sup>1</sup> The warning may be by hailing. See *Halleck*, p. 610, § 15.

<sup>2</sup> *Ortolan, Règles Int. et Dipl. de la Mer*, vol. 1, p. 253.

<sup>3</sup> *Halleck*, p. 606, § 10.

### *Salutes.*

67. An armed ship entering a fortified port or roadstead of a foreign nation must salute it, and must be saluted in return.<sup>1</sup> But ships of small armament may omit the salute, communicating the reasons to the authorities of the port.<sup>2</sup>

Beyond this, a salute is not required between ships and fortifications, or between ships themselves.<sup>3</sup>

<sup>1</sup> For the controversies on the right of salute, see *Ortolan*, vol. 1, p. 316.

The only sufficient object of making a salute obligatory is to give notice to the authorities of the arrival of an armed foreign ship.

<sup>2</sup> *Guide Pratique des Consuls*, vol. 2, p. 38.

<sup>3</sup> *Halleck* (p. 118, § 29.) says, a salute should be returned gun for gun. To refuse an exchange of salutes is regarded as evidence of a want of friendship and good will, which justifies the other party in asking explanations; but it can not in itself be considered an offense or an insult, sufficient to justify hostilities. *Id.*, p. 110, § 21.

### *Searches forbidden.*

68. Except as provided in article 85, a ship of one nation, on the high seas, is not subject to search by a ship of another nation.

### *Flag and documents.*

69. Every ship navigating waters beyond the territory of its nation is bound to carry the flag of its nation, and to have on board documentary evidence of its national character.

The documentary evidence of the character of a public armed ship is the commission of its commander, or the written order of his government.

That of a private or other unarmed ship must be in the form prescribed by the article entitled *Contents of Passport*, in Chapter XX., entitled NATIONAL CHARACTER OF SHIPPING.

*De Cauchy Dr. Mar. Int.*, vol. 1, p. 47; *Bluntschli*, § 326; 1 *Phill.*, § CCIII.

<sup>1</sup> See provisions of Chapter XX., on NATIONAL CHARACTER OF SHIPPING.

## CHAPTER VII.

## DISCOVERY.

## ARTICLE 70. Right of discovery.

71. Authority.

72. Ratification.

73. Right of possession.

74. Its exercise, how manifested.

75. Limits of continental discovery.

76. Abandonment of right of possession.

*Right of discovery.*

70. Every nation has the right of exploration for new territory.

*Authority.*

71. Authority to search for new territory which shall inure to the benefit of a nation, may be conferred by it on the members of any nation whatever, by a previous authorization or by subsequent ratification.<sup>1</sup> Without such authority, a discovery made even by a member of the nation confers no right upon it.

<sup>1</sup> *Heffter*, § 70, subd. III., p. 142, and note 4.

<sup>2</sup> A contrary doctrine has been contended for by the United States, but without sufficient ground. 1 *Phill. Int. Law*, § CCXXXV., p. 250; *Heffter*, § 70, subd. III., p. 142, and note 4; *Bluntschli*, § 279.

*Ratification.*

72. A discovery not previously authorized by the nation can not be subsequently ratified by it, to the prejudice of any other nation, without the consent of the latter.

*Right of possession.*

73. The nation, under whose authority a discovery of territory is made, has the right to take possession of it as a part of its territory.



See *Johnson v. McIntosh*, 8 *Wheaton's U. S. Sup. Ct. Rep.*, 543; *Worcester v. Georgia*, 6 *Peters' U. S. Sup. Ct. Rep.*, 515; 3 *Kent's Com.*, 378; 1 *Id.*, 178, and note.

The individual discoverer has a prior right, as against other individuals, only to so much of the soil as he actually occupies and uses. *American Guano Company v. United States Guano Company*, 44 *Barbour's (New York,) Rep.*, 23.

*Its exercise, how manifested.*

74. The intent to exercise the right of possession can be manifested only by an actual beneficial occupation.

1 *Phillimore's Intern. Law*, § CCXLVIII.; *Bluntschli, Droit Intern. Codifié*, § 278.

*Limits of continental discovery.*

75. If the discovered territory is a continental sea-coast, or any part of it, possession thereof is deemed to extend into the interior, to the sources of the rivers emptying within the discovered coast, to all their branches, and the territory watered by them, except as already occupied.

5 *American State Papers*, 327-329. See to the contrary, *Bluntschli*, § 282.

*Abandonment of right of possession.*

76. The right of possession is deemed abandoned if the intent to exercise it is not manifested within twenty-five years after the discovery.

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## CHAPTER VIII.

## EXPLORATION AND COLONIZATION.

ARTICLE 77. Right of exploring and colonizing.

78. Exception.

79. Right of pre-emption.

*Right of exploring and colonizing.*

77. A nation has for itself and each of its members the right to explore and colonize any territory not within the territorial limits of a civilized nation.

“When Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws but the sovereignty of their own State.” *Adv. Genl. v. Raneé Surnomoye Dossee*, 2 *Moore’s Privy Council Rep.*, (N. S.,) 59; *Forsyth’s Cases and Opinions in Const. Law*, 20.

*Exception.*

78. The continents of Europe, Asia, and America are, in every part, under the dominion of established government, and are not subject to colonization or settlement, in any portion thereof, except with the consent of such government.

*Gardner’s Institutes*, p. 24, § 12.

*Right of pre-emption.*

79. The nation first exercising the right of colonization acquires thereby the right of first purchase from the native inhabitants. Whenever an uncivilized community has an established government, that government is to be respected by civilized governments so far at least, as that in the first instance intercourse with its people is to be sought through such government, and redress for injuries from any of them is to be demanded of it.

1 *Phillimore’s Intern. Law*, § CCXLIII. Compare *Bluntschli, Droit Intern. Codifié*, §§ 280-1.

## CHAPTER IX.

## FISHERIES.

## ARTICLE 80. Common right of fishery.

## 81. Limits.

*Common right of fishery.*

80. A nation has for itself and each of its members the right to take fish in any waters which are not within the territorial limits of any other nation whatever.

1 *Phill. Int. Law*, pp. 202, 205; *Bluntschli*, § 307; 1 *Twiss*, §§ 176, 182; *Dana's Wheaton*, §§ 180, 270-275.

See treaty, as to fisheries, between France and Great Britain, 11 November, 1867, 9 *De Clercq*, 773; the convention, relative to New Foundland fisheries, between France and Great Britain, 14 January, 1857, 7 *De Clercq*, 208; and an additional act between France and Spain regulating international fisheries, March 31, 1859, 7 *De Clercq*, 578.

*Limits.*

81. For the purposes of this Chapter, the territorial limits of a nation extend only to three geographical miles from low-water mark, to be measured with respect to bays, the mouths of which do not exceed ten geographical miles in width, from a straight line drawn from headland to headland.

*Marten's Nouv. Rec.*, 16, p. 954.

Convention between England and France, Art. 9, Aug. 3, 1839.

Compare Article 28.

The right of fishermen lawfully pursuing their calling, to land for the purpose of drying and mending their nets, and procuring necessary supplies, is recognized in common with the equal privileges of foreign vessels generally, by the provisions of this Code, as to NAVIGATION, and as to UNIFORMITY.

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## CHAPTER X. .

## PIRACY.

ARTICLE 82, 83. "Pirate" defined.

- 84. Harboring pirates forbidden.
- 85. Capture of pirates authorized.
- 86. Trial and condemnation.
- 87. Destruction.
- 88. Captor's reward.
- 89. Restoration of property.
- 90. Salvage, &c., not allowed to public vessels.

*"Pirate" defined.*

**82.** Every person whosoever, who, being an inmate of a private ship,<sup>1</sup> upon the high seas,<sup>2</sup> as defined by Article 53, willfully and not in self-defense :

1. Destroys, or seizes by force and appropriates, any other ship, or its lading, or any part of either ;<sup>3</sup> or,

2. Kill, wounds, or seizes by force and abducts any inmate whatever of any other ship ;

Is deemed a pirate.

<sup>1</sup> It is not necessary that the ship should be an armed ship. *Goujet et Merger, Dict. du Droit Commercial*, 4, p. 178, § 13.

<sup>2</sup> By the law of the United States and of France, this limitation of place is not essential to the crime. *Loi 10 avr. 1825, art. 2.* See 2 *Goujet et Merger*, 4, p. 178.

<sup>3</sup> "The motive may be gratuitous malice, or the purpose may be to "destroy, in private revenge for real or supposed injuries done by persons or classes of persons, or by a particular national authority." *Dana's Wheaton*, § 124, note 83.

Depredation not amounting to robbery is sometimes said not to amount to piracy. To the contrary, however, see *Dana* above ; *Goujet et Merger*, above, §§ 9, 11.

The abolition of *privateering* is provided for in BOOK SECOND of this Code.

*The same.*

**83.** Every person whosoever, who, without authority from the owner, and with intent to injure, vex, or annoy any person whomsoever, or any nation whatever :

- 1. Removes, destroys, disturbs, obstructs, or injures

any oceanic telegraphic cable not his own, or any part thereof, or any appurtenance or apparatus therewith connected, or severs any wire thereof; or,

2. Destroys or injures any international railway, canal, lighthouse, or any other structure or work, the perpetual neutrality of which has been declared;

3. Or who beyond the territory<sup>1</sup> of any nation reduces to slavery, or holds in slavery, any person whomsoever, or conveys, or receives with intent to convey, any person whomsoever as a slave;

Is deemed a pirate.

The abolition of privateering will render unnecessary any provision for the case of foreigners, who accept privateering commissions or letters of marque from a nation at war with another, and who, when taken by the latter nation, may be punished as pirates, under some treaties. Treaty between the United States and Great Britain, 1794, Art. XXI., 8 *U. S. Stat. at L.*, 127.

<sup>1</sup> The acts specified in this subdivision, when committed within the territory of any nation, should be left to the local law.

#### *Harboring pirates forbidden.*

84. No nation can receive pirates into its territory, or permit any person within the same to receive, protect, conceal or assist them in any manner; but must punish all persons guilty of such acts.

Treaty between the United States and Great Britain, 1794, Art. XX., 8 *U. S. Stat. at L.*, 127.

#### *Capture of pirates authorized.*

85. If there be probable cause to suspect that a ship is piratical,<sup>1</sup> any person whosoever may cause its arrest and search; and if thereupon the suspicion is justified, may capture the ship: but if the suspicion is not justified, the person and ship causing the arrest must make satisfaction in damages according to the circumstances.

<sup>1</sup> The *Mariana Flora*, 11 *Wheaton's U. S. Sup. Ct. Rep.*, 40.

#### *Trial and condemnation.*

86. Any piratical ship may be brought into a port of any nation, and the ship, its lading and inmates, may be there condemned by the courts of such nation.

*Destruction.*

87. If they are unable to bring her into port, the captors of a piratical ship may destroy her.

*Captor's reward.*

88. A ship or its lading condemned for piracy is to be adjudged to belong to its captors, except as respects the property of innocent third persons.

*Restoration of property.*

89. Property taken by pirates, and brought or found within the territorial limits of a nation, is to be restored<sup>1</sup> to its innocent owner, saving the rights of holders thereof in good faith and for value, and subject to the payment of such reasonable salvage and expenses, not exceeding one-fourth of its value, as may be adjudged by the courts of such nation.<sup>2</sup> Proceedings for such restoration must be there begun on behalf of such owner, or the nation of which he is a member, within one year from the time of so bringing or finding the property.<sup>3</sup>

<sup>1</sup> To this effect are most of the following treaties :

*Treaty between the United States and*

France	1778, Art. XVI., 8 <i>U. S. Stat. at L.</i> , 22.
Sweden,	1783, " XVII., 8 <i>Id.</i> , 70.
Great Britain,	1794, " XX., 8 <i>Id.</i> , 127.
Central America,	1825, " IX., 8 <i>Id.</i> , 326.
Mexico,	1831, " XI., 8 <i>Id.</i> , 414.
Chili,	1832, " VII., 8 <i>Id.</i> , 435.
Colombia,	1824, " VII., 8 <i>Id.</i> , 308.

*Treaty between France and*

New Grenada,	15 May, 1856, Art. XVII., 7 <i>De Clercq</i> , 102.
Honduras,	22 Feb. 1856, " 7 <i>Id.</i> , 10.
Nicaragua,	11 Apr. 1859, " XIV., 7 <i>Id.</i> , 586.
San Salvador,	2 Jan. 1858, " XVI., 7 <i>Id.</i> , 362.

<sup>2</sup> Treaty between the United States and Mexico, 1831, Art. XI., 8 *U. S. Stat. at L.*, 414.

Upon payment of one-third of their value, *Valin, Commentaire sur L'Ord.* liv. 3, tit. 9, art. 10 ; one-eighth, 6 *Geo. IV.*, ch. 49, § III. ; 13 & 14 *Vict.*, ch. 26, § V.

<sup>3</sup> Within a year and a day after being reported at the Admiralty, *Valin*, above.

*Salvage, &c., not allowed to public ships.*

**90.** If property taken by pirates is brought in or found by a public ship of war, the deductions for salvage and expenses, allowed by the last article, are not to be made.

Treaty between the United States and Sweden, 1783, Art. XVII., 8 *U. S. Stat. at L.*, 70. Approved by *Hautefeuille, Des Nations Neutres*, 4, p. 427.

## TITLE III.

## INTERCOURSE OF NATIONS.

## CHAPTER XI. General Provisions.

XII. Public Ministers.

XIII. Consuls.

XIV. Commissioners.

## CHAPTER XI.

## GENERAL PROVISIONS.

- ARTICLE** 91. Intercourse, by what agents conducted.  
92. Minister's or consul's nation, and consul's or commissioner's residence defined.  
93. Nations forbidden to entertain unofficial negotiations.  
94. Public agents forbidden to make unofficial negotiations or communications.  
95. Falsely assuming diplomatic powers, &c.  
96. Right of legation, &c.  
97. Obligation to receive public agents.  
98. A nation may refuse to receive its own members.  
99. Personal objections.  
100. Rank or status.  
101. Conditions may be imposed.  
102. Conditional reception.  
103. Inconsistent pretensions.  
104. Several missions.  
105. List of family, official and personal, to be furnished.  
106. Secretary in case of absence, &c., of chief.  
107. Insignia of office, and flag.  
108. Exemption from liability for official acts.  
109. Emergencies.  
110. Duty to enforce exemption.  
111. Interference with a dispatch to or from a public agent.



*Intercourse, by what agents conducted.*

91. The agents through whom the intercourse of nations is conducted are :

1. Public ministers ;
2. Consuls ; and,
3. Commissioners :

And they are herein designated as public agents.

*Minister's or consul's nation, and consul's or commissioner's residence defined.*

92. The terms "nation of the minister or consul," or "minister's or consul's nation," as used in this Code, mean the nation by authority of which he is appointed, without regard to his individual national character.

The terms "nation or country of the consul's or commissioner's residence," mean the nation, or the state, province or colony of a nation, within the territory of which he is authorized to exercise his functions.

*Nations forbidden to entertain unofficial negotiations.*

93. No nation shall entertain negotiations<sup>1</sup> affecting its intercourse or relations with another, through or with any other persons than public agents duly accredited by one to the other ; or duly accredited by some third nation offering friendly offices, with the consent of both.<sup>2</sup>

<sup>1</sup> It is said to be the settled practice of the United States to hold no private interviews with persons with whom it cannot hold official interviews. *Dana's Wheaton*, § 76, note 41, p. 131.

<sup>2</sup> The friendly offices of the representatives of third powers are invoked in case of war, for the protection of individuals, &c. ; and perhaps provision for similar offices during peace, in exigencies, such as absence, &c., should be made.

*Public agents forbidden to make unofficial negotiations or communications.*

94. Public agents must make no communication to the people of the nation to which they are accredited,

intended to affect the action of its government ;<sup>1</sup> nor enter into negotiation tending to affect international intercourse or relations, with any persons other than those duly authorized by the government.<sup>2</sup>

<sup>1</sup> The act of an envoy, in communicating with the people through the press, has been said to be a contempt of the government. 1 *Opinions of U. S. Attorney Generals*, 74.

<sup>2</sup> It is for each nation to determine, by its constitution and laws, the department of government in which the administration of its foreign affairs shall be vested.

*Falsely assuming diplomatic powers, &c.*

95. No person, other than a public agent mentioned in article 91, shall assume to represent a nation in its intercourse with another nation, or enter upon negotiations with the government of any nation other than his own, intended to affect its intercourse or relations with another.

A violation of this article is a public offense.

A deputation, addressing, in the name of their own nation, a foreign sovereign, on the relations of peace and war between the two countries, are guilty of an offense against the law of nations. *Annual Register*, 1853, p. 11, cited in *Lawrence's Wheaton*, p. 373, note 115. Such acts are considered as offenses, also, by some systems of municipal law.

*Right of legation, &c.*

96. Any nation<sup>1</sup> may send to any other nation as many public agents of any class mentioned in article 91, as it may choose,<sup>2</sup> subject to the provisions of this Title.

<sup>1</sup> It is unnecessary to explain where this power rests in the case of confederacies, or vice-royalties ; because these provisions apply only to nations uniting in the Code.

<sup>2</sup> Several ministers may be sent by one nation to the same foreign court. *Lawrence's Wheaton*, p. 386.

This and the six following articles are suggested by the rules usually given respecting public ministers ; but are thought to be equally appropriate in their application to all classes of public agents.

*Obligation to receive public agents.*

97. Every nation is bound to receive public agents of other nations, except as otherwise specified in this Title, and to treat them as herein provided.

By the existing rule of international law, the duty to receive foreign ministers is of imperfect obligation. *Dana's Wheaton*, § 297 ; *Klüber*,

*Droit des Gens*, § 176, and note b; 2 *Phillimore's International Law*, 154; *Fiore, Nouveau Droit International*, vol. 2, p. 548. According to *Heffter, Droit International*, § 200, there is no obligation but that of courtesy.

But a general refusal to receive any envoy renders international intercourse impossible; and in the three following articles are enumerated the cases in which a refusal should be allowable, between nations that are parties to this Code.

The duty to receive consuls is positively declared in many treaties, subject only to the right of a nation to exclude *all* consuls from particular places, where it may be inconvenient to receive the consuls of any nation.

*A nation may refuse to receive its own members.*

**98.** A nation may refuse to receive, as public agents, persons who are its own members, at the time of such refusal.

France refuses to receive her own citizens as ministers. *Klüber*, § 186, and note c. So do Sweden and the Netherlands.

Objection has been made to receiving as a minister one who was formerly a member of the nation, but has been naturalized by the nation sending him. *Klüber*, § 186, and note c. It has been suggested that in such case a special agreement should first be made. *Dana's Wheaton*, § 251, note 137. That suggestion, however, should hardly be followed. According to the provisions in the Chapter on NATIONAL CHARACTER OF PERSONS, naturalization would effect an absolute and complete change of nationality.

Consuls are often chosen from among the members of the nation in which they are to reside; but it is understood to be the existing rule that a nation may refuse to receive any particular person. *Bluntschli, Droit International Codifié*, § 248. And it is believed that a uniform rule applicable to all agents of public intercourse, such as is suggested in this and the following articles, would be more convenient.

*Personal objections.*

**99.** A nation may refuse to receive, as public agent, any one who is personally objectionable,<sup>1</sup> on informing the government by which he is sent, that the refusal is for personal reasons; but the reasons need not be more particularly stated.<sup>2</sup>

<sup>1</sup> 2 *Phill. Int. Law*, 149. Several cases of refusal on personal grounds are mentioned in *Klüber*, § 187, note d; *Dana's Wheaton*, § 251, note 137.

<sup>2</sup> *Dana's Wheaton* (§ 210) allows the refusal, if the motives are alleged. But the above rule should seem to be sufficient.

*Rank or status.*

**100.** Mere social condition, or status, of a person

sent as public agent by one nation to another, is not a valid reason for personal objections, within the meaning of the last article.

*Bluntschli*, §§ 162 and 164, note. *Wheaton* (*Lawrence's Ed.*, p. 386) states that usage requires the interchange, in permanent missions, of persons of equal rank. It is submitted that this should not be recognized as a rule.

*Conditions may be imposed.*

**101.** A person whom the nation might refuse to receive as public agent, under article 98 or 99, may be received upon conditions,<sup>1</sup> to be accepted or rejected, as the nation sending him may determine.

*Halleck's International Law*, p. 185. *Bluntschli* (§§ 167, 168) says, propriety requires that the foreign nation should be previously notified of the name of the proposed envoy, and if no objection be made or question raised by the latter, as to the appropriateness of the choice, it may be inferred that there are none; and, after an envoy has been received, no objection can be made to his appointment for causes which existed or which might have been known, before the reception.

It seems hardly necessary, however, to recognize such a restriction.

<sup>1</sup> The conditions are usually the waiver of immunities.

*Conditional reception.*

**102.** If no condition is expressed at or before the time of reception, the reception is unqualified, and the agent is then entitled to all the privileges of his office.

If received upon condition, the agent has all the privileges of his office not expressly excluded by the terms of his reception.

*Inconsistent pretensions.*

**103.** In the cases of persons claiming powers inconsistent with the laws or policy of the nation to which they are sent, such nation may require their powers to be defined, and reduced to satisfactory limits.

*Heffter*, § 200; *Halleck*, p. 185.

*Several missions.*

**104.** The same person may be accredited to more than one nation at the same time;<sup>1</sup> but in such case any nation may for that reason refuse to receive him.<sup>2</sup>

<sup>1</sup> *Lawrence's Wheaton*, p. 386, and note 123.

<sup>2</sup> This qualification seems necessary for the case of unrecognized States ; and others, where incompatibility of functions may arise.

*List of family, official and personal, to be furnished.*

**105.** Every public agent, on being received, must furnish to the government receiving him a list of the persons composing his family, personal or official,<sup>1</sup> or attached to his office, and must thereafter give the like notice of any change therein.<sup>2</sup>

The government may refuse to recognize them, or any of them, or annex conditions, for the same reasons and in the same manner as is provided in articles 98-104.

<sup>1</sup> "Suite" is defined in article 119.

<sup>2</sup> This article is suggested by the provision in the consular treaty between France and Austria, Dec. 11, 1866, (9 *De Clercq*, p. 669, Art. VI.) which requires consuls at the head of consular posts to give such list on their arrival. The time of recognition seems more appropriate than that of arrival.

*Secretary in case of absence, &c., of chief.*

**106.** Upon the recall, death, resignation or absence of a public agent, or his inability to discharge the duties of the office, the subordinate who becomes charged with the affairs of the office, and whose official character has previously been made known to the government,<sup>1</sup> as required by article 105, has, for the time being, the powers and immunities of a temporary minister,<sup>2</sup> or of his chief, if the chief be a consul,<sup>3</sup> or other agent, although not furnished with a formal letter of credence or act of permission as such.

<sup>1</sup> The previous communication of the official character is obviously a proper condition.

<sup>2</sup> For this rule, as to ministers, see *Lawrence's Wheaton*, p. 440, note; *Bluntschli*, § 180. Rank is not affected.

<sup>3</sup> For this rule, as to consuls, see the convention between the United States and Italy, February 8, 1868, 15 *U. S. Stat. at Large*, (Tr.) 185, Art. VII. The treaty between France and Peru, March 9, 1861, Art. XLI. (8 *De Clercq*, 193,) provides, in reference to consuls, that the officer highest in rank at the consulate shall act *ad interim*.

*Insignia of office, and flag.*

**107.** A public agent having a fixed residence or place

for exercising his functions, may put over the outer door of his official residence or office the arms of his nation, with an inscription designating its character.

And he may raise the flag of his nation on such building,<sup>1</sup> or on any vessel where he is exercising his functions.<sup>2</sup>

<sup>1</sup> This article is suggested by the treaty between the United States and Italy, as to consuls. 15 *U. S. Stat at L.*, (*Tr.*) 185, Art. V.

<sup>2</sup> The above treaty, however, does not allow the flag to be raised by a consul in the capital of either country when a legation is there.

The consular convention between France and Brazil, December 10, 1860, (8 *De Clercq*, 153,) gives the right of raising the flag only on days of public solemnities, national or religious. See also, the treaty of friendship, commerce and navigation between France and Peru, March 9, 1861. Art. XLIV., 8 *De Clercq*, 193.

To similar effect as the above is the consular convention between France and Austria, Dec. 11, 1866, (9 *De Clercq*, p. 669,) which gives, however, the right to raise the flag on the consular mansion, and on the vessel in the port in which they may be exercising their functions.

### *Exemption from liability for official acts.*

**108.** A public agent is not subject to the jurisdiction of the nation, within the territory of which he resides or exercises his functions, for official acts done under the direction of the government of his nation.

*Halleck* (p. 243) states this rule as applicable to consuls. Perhaps it should be restricted to those agents who have been expressly received by the nation in which they exercise their functions. See *Guide Pratique des Consulats*, vol. 1, p. 10.

### *Emergencies.*

**109.** The exemptions or immunities mentioned in this Title may be withdrawn in the case of an emergency affecting the existence of the nation.

*Dana's Wheaton*, § 227, note 129.

### *Duty to enforce exemption.*

**110.** The nation within whose jurisdiction a public agent is entitled to enjoy privileges or immunities, is bound to enforce them, and to prevent and redress every violation thereof committed within the same.

This rule is drawn from the authorities applicable to ministers. *Heffter*, § 204.

Criminal punishment, however, can not be inflicted, except as provided by the law of the place. *Heffter*, § 205, p. 383. Thus, in *Commonwealth v. De Longchamps*, 1 *Dallas' U. S. Supreme Ct. Rep.*, 116, the court refused to imprison the defendant for an assault upon a secretary, until his sovereign should declare that the reparation was satisfactory.

By the rule in force at present, this obligation is said to be imposed only upon the nation to which he is sent; (*Lawrence's Wheaton*, p. 421, note 141 :) although by courtesy a nation through which a minister is passing will usually extend protection.

*Interference with a dispatch to or from a public agent.*

**111.** Any person whosoever willfully and without authority impeding the transmission or delivery, or opening, reading, copying, or divulging the whole or any part, of the contents of any dispatch sent by or to a public agent, is guilty of a public offense.

## CHAPTER XII.

### PUBLIC MINISTERS.

#### SECTION I. Appointment and reception.

- II. Rank.
- III. Powers.
- IV. Immunities.

#### SECTION I.

##### APPOINTMENT AND RECEPTION OF PUBLIC MINISTERS.

- ARTICLE** 112. Four classes of ministers.
- 113. Letters of credence.
  - 114. Letters, how issued.
  - 115. Power to act in a congress or conference.
  - 116. Full power to negotiate treaty.
  - 117. Notifying arrival.
  - 118. Recognition of minister's nation by reception
  - 119. Official and personal family.

*Four classes of ministers.*

**112.** Public ministers are either :

1. Ambassadors ;<sup>1</sup>
2. Envoys ;<sup>2</sup>
3. Resident ministers ; or,
4. Temporary ministers, otherwise called *chargés d'affaires*.<sup>3</sup>

*Lawrence's Wheaton*, p. 379 ; *Bluntschli, Dr. Intern. Codifié*, § 171 ; *Congress of Vienna*, 1815 ; of *Aix-la-Chapelle*, 1818.

<sup>1</sup> This class includes papal legatees and nuncios. The distinction, stated in the books, that ambassadors represent the person of the sovereign by whom they are sent, while the other classes of ministers represent their principal only in respect to the particular business committed to their charge, (*Protocol of the Congress of Vienna*, Art. II.) seems now to amount to nothing more than saying that they are the highest class of public ministers. Dignities peculiar to their rank are matter of etiquette, not necessary to be defined in a Code.

<sup>2</sup> These include ministers plenipotentiary, envoys ordinary and extraordinary ; also, the internuncios of the pope. *Bluntschli*, § 173, note.

<sup>3</sup> *Vattel* says, that the secretary of the embassy (not that of the ambassador) having his commission from his sovereign, is a sort of public minister. But it is hardly necessary to recognize this as a fifth class.

*Flore (Nouv. Dr. Intern.*, vol. 2, p. 612) holds with some others to the opinion that consuls are a class of *diplomatic* officers, but this is rather a dispute about name than function.

*Letters of credence.*

**113.** A public minister, sent by one nation to another, must be furnished by his own government with a letter of credence, addressed as provided in article 114, and an authenticated copy thereof must be delivered to the government of the nation to which he is sent.

*Lawrence's Wheaton*, p. 388.

*Letters, how issued.*

**114.** Letters of credence are issued by, and addressed to, the sovereign or chief executive officer of the nation, for the ministers of the first three classes ; and by and to the minister, or other officer having charge of foreign affairs, for those of the fourth class.

*Bluntschli*, § 185 ; *Lawrence's Wheaton*, p. 388.



*Power to act in congress or conference.*

**115.** A public minister sent to a congress or conference, must be furnished with a letter of credence, or other documentary evidence of his powers, to be exchanged or deposited with those of the other members of the congress or conference.

*Lawrence's Wheaton*, p. 388.

*Full power to negotiate treaty.*

**116.** A public minister, authorized to conclude a treaty, must be furnished with written authority therefor, in addition to his letter of credence.

*Lawrence's Wheaton*, p. 443.

*Notifying arrival.*

**117.** A public minister, on arriving at his post, must notify his arrival to the minister, or other officer having charge of foreign affairs.

The mode of notification, and the subsequent ceremonies of audience, differ according to the class of the minister, and the usage of the government. *Lawrence's Wheaton*, p. 392; *Bluntschli*, §§ 188, 189.

*Recognition of minister's nation by reception.*

**118.** The reception of a public minister is a recognition of the government by which he is sent.

*Sir J. Mackintosh's Works*, p. 747, cited in *Lawrence, Commentaire sur Wheaton*, p. 196; *Bluntschli*, § 169.

*Wheaton* says, that for the purpose of avoiding recognition, diplomatic agents are frequently substituted, who have the powers and immunities of ministers, without the representative character or honors. Such were Messrs. Mason and Slidell, the messengers of the Confederacy, who were seized on board the Trent. *Lawrence's Ed.*, p. 377, note 118. But the rule stated in the text is the better supported by reason. There cannot be agents without a principal.

*Official and personal family.*

**119.** The persons actually employed by a public minister in aid of his diplomatic duties, or in his domestic service, constitute his family, official or personal.

The term "official family," as here used, is preferred to "*suite*."

Some of the authorities indicate that a permanent or indefinite employment is necessary, to entitle the employee to the immunities; but this seems too strict a rule. It would sometimes exclude bearers of dispatches and messengers.

## SECTION II.

## RANK OF PUBLIC MINISTERS.

## ARTICLE 120. Classes.

## 121. Relation between courts.

*Classes.*

**120.** Public ministers take rank, between themselves, in each class, according to the date of the official notification, to the government to which they are sent, of their arrival at their post.

*Protocol of the Congress of Vienna*, 19 March, 1815, Art. IV., quoted in *Lawrence's Wheaton*, p. 380, note. This rule is there qualified so as not to affect the precedence accorded to the representatives of the pope.

*Relation between courts.*

**121.** No distinction of rank among public ministers arises from consanguinity, or family, or political relations between their different sovereigns or nations.

*Protocol of the Congress of Vienna*, 1815, Art. VI.; *Wheaton, Elem. Int. Law*, pp. 380, 386.

## SECTION III.

## POWERS OF PUBLIC MINISTERS.

## ARTICLE 122. Powers defined by instructions.

123. Issue of passports.

124. Authentication of documents.

125. Communications, when to be in writing.

126. Termination of powers.

127. Death.

128. Recall.

129. Contingent negotiation in case of death, deposition or abdication.

130. Suspension of powers pending recognition.

131. Withdrawal.

132. Dismissal.

133. Assigning reasons.

134. Preventing personal intercourse.

135. Ratification of old letter of credence.

*Powers defined by instructions.*

**122.** The powers of a public minister are such as are given him by his own nation<sup>1</sup> subject to the provisions of this Code.

The nation to which he is accredited cannot require him to disclose his instructions.

<sup>1</sup> The ministers of all classes accredited to one government often unite in a collective capacity for acts of courtesy, and the expression of common opinion; but they have no authority except in their individual functions. *Bluntschli*, however, (§ 182, note,) regards the *corps diplomatique* as the germ of the future organization of the world.

*Issue of passports.*

**123.** A public minister may give passports to members of his own nation, but to no others.<sup>1</sup>

It is hardly desirable that the system of passports should be retained, except to afford certificates of national character, and, therefore, none should be issued to foreigners even by leave or sufferance, as has been done. See *Lawrence's Wheaton*, p. 389, note 126.

<sup>1</sup> As provided in the articles on *Passports and Safe Conducts and Effect of Passports*, in Section I., respecting RIGHTS OF RESIDENCE, of Chapter XXV., entitled PERSONAL RIGHTS OF FOREIGNERS.

*Authentication of documents.*

**124.** Public ministers and their secretaries of legation may receive or authenticate, for use in their respective nations, such documents, besides those specially provided for by this Code, as they may be authorized to receive or authenticate by the laws and regulations of their nations respectively.

*Communications, when to be in writing.*

**125.** A minister, or other officer in charge of foreign affairs, may require a copy, to be left with him, of any document or written paper, the contents of which a public minister reads or otherwise makes known to him.

*Dana's Wheaton*, § 219, note 123. It may be thought better to provide that either party may require any official communication to be reduced to writing.

*Termination of powers.*

**126** The powers of a public minister are terminated, either :

1. By death ;
2. If appointed for a fixed term, by the expiration of the term ;<sup>1</sup>
3. If serving temporarily, by the resumption of duty by his chief, or by appointment of a new chief ;
4. If the only object of the mission was special, by its fulfillment or final failure ;
5. By recall by his own nation ;
6. By the death,<sup>2</sup> deposition,<sup>3</sup> or abdication of the sovereign,<sup>4</sup> by or to whose nation<sup>5</sup> he is accredited ; to the extent provided in article 129, and no further ;
7. By a change in the dynasty or the form of government of either nation ;
8. By his voluntary withdrawal, as provided in article 131 ;
9. By his dismissal by the nation to which he is accredited, in the cases provided in article 132 ; or,
10. By his transfer from one class to another of those mentioned in article 112.

<sup>1</sup> In this and the next case, a formal recall is unnecessary.

<sup>2</sup> *Lawrence's Wheaton*, p. 429. *Bluntschli*, § 231, says, that death does not annul the letters of credence, although it is usual to renew them.

<sup>3</sup> *Lawrence's Wheaton*, p. 430, note 145.

<sup>4</sup> No such rule applies in case of the succession to the chief executive office of a republic. *Lawrence's Wheaton*, p. 430, note 145.

<sup>5</sup> A change in the ministry of foreign affairs does not affect the powers of temporary ministers accredited to such ministry. *Bluntschli*, § 233.

*Fiore*, (*Nouv. Dr. Intern.*, vol. 2, p. 628,) says, that the powers terminate by nomination to other functions incompatible with those of minister ; but this should be left to be treated as a ground of dismissal.

### *Death.*

**127.** On the death of a public minister, the secretary of his legation, or in the absence or inability of such secretary, the minister of some other nation should place seals upon his effects, for the benefit of those interested, and take charge of his body, for its interment or conveyance home.

In case of their failure to do so, the nation to which he is accredited must undertake these duties.

By the existing rule, the local authorities do not interfere except in case of necessity; *Halleck's Int. Law*, p. 235, § 34; and then only for the protection of the effects, &c. *Bluntschli*, § 240.

### *Recall.*

**128.** When a nation recalls its public minister by a letter of recall, an authenticated copy thereof must be delivered to the authority<sup>1</sup> to which he was accredited.

*Lawrence's Wheaton*, p. 488. Letters of recall are not always sent, in case of recall on account of rupture of friendly relations. *Fiore, Nouv. Dr. Intern.*, vol. 2, p. 631.

<sup>1</sup> To the sovereign, or to the minister of foreign affairs. See Article 114.

### *Contingent negotiation in case of death, deposition or abdication.*

**129.** In case of the death, deposition or abdication of the sovereign by or to whose nation a public minister is accredited, the powers of the minister to enter into new stipulations cease; but negotiations already commenced may be continued, subject to subsequent ratification or rejection.

This rule is from *Lawrence's Wheaton*, p. 433, extended so as to include the case of deposition:

*Fiore, (Nouv. Dr. Int., vol. 2, p. 629.)* says, that it is only the ministers of the first two classes whose powers are suspended by the death of the sovereign. The *chargé d'affaires*, being accredited by the ministers of foreign affairs, can continue his functions even after the death of the sovereign. But the true distinction should seem to be between the functions which are continuous in their nature, and those which are not continuous. The minister may still intervene for the protection of his countrymen, and may issue passports and the like.

### *Suspension of powers pending recognition.*

**130.** When the powers of a public minister are terminated by a change in the dynasty or form of government of the nation by or to which he is accredited, he may remain at his post until opportunity is allowed for determining the question of recognition of the new government; and in the meantime, he is entitled to the immunities of a public minister, if he assumes no powers.

*Lawrence's Wheaton*, p. 378, note 117; *Halleck*, p. 237, § 37. And see *Bluntschli*, § 230; *Dana's Wheaton*, § 209, note 121.

*Withdrawal.*

**131.** A public minister may at any time declare his mission terminated, by notifying his withdrawal to the authority<sup>1</sup> to which he was accredited.

He is responsible only to his own nation for a breach of duty or instructions in this respect.

<sup>1</sup> To the sovereign, or to the minister of foreign affairs. See Article 114.

*Dismissal.*

**132.** A nation may dismiss a public minister accredited to it by another nation :

1. When his nation has violated this Code, or any special compact ; or,

2. For any personal objection by reason of which the reception of a minister may be refused, according to articles 99 and 100.

*Assigning reasons.*

**133.** A nation dismissing a public minister must assign the reason thereof to the nation by which he was sent.

If they are personal, it is sufficient to state the fact, without mentioning particulars, according to article 99.

*Preventing personal intercourse.*

**134.** Upon dismissing a public minister, a nation may, if its own safety appears to require it, forbid all intercourse with him.

*Grotius*, Bk. 2, c. 18, § 4 ; *Kent's Commentaries*, vol. 1, p. 39. Article 142 sufficiently provides for his safe return.

*Ratification of old letter of credence.*

**135.** If upon a termination of the powers of a public minister, in cases under article 126, he is authorized to continue as a minister to the same nation, whether in the same class of ministers or not, a formal notification that his letter of credence is ratified is equivalent to a new letter of credence.

The rule already applied in some cases, is in substance the same as that above stated.

## SECTION IV.

## IMMUNITIES OF PUBLIC MINISTERS.

- ARTICLE 136.** Right of passage.
- 137, 138. Passage during war.
  - 139. Exemptions of person and property.
  - 140. Duration of exemptions.
  - 141, 142. Exceptions as to exemptions.
  - 143. Dwelling-house.
  - 144. Family, official and personal.
  - 145. Servants.
  - 146, 147. Waiver of privileges.
  - 148. Property in trade.
  - 149. Returning minister.
  - 150. Domicil.
  - 151. Jurisdiction of his own nation.
  - 152. High crimes.
  - 153. Arrest of criminal act.
  - 154. Right to punish family.
  - 155. Taxes.
  - 156. Importations.
  - 157. Bearers of dispatches.
  - 158. Reparation for violence to property.

*Right of passage.*

**136.** Every public minister has the right of passage, with his family, official and personal, through the territory of every nation with which his own nation is at peace, so far as may be necessary to enable him to reach his official destination; but the line of transit may be prescribed by the nation through whose territory he may pass at its option.<sup>1</sup>

<sup>1</sup> See 2 *Phill. Int. Law*, 186-189. The general principle was acknowledged, while the limitation here stated was insisted upon, by the government of France, in the case of Mr. Soule, in 1854. See Correspondence, *Lawrence's Wheaton*, p. 422, note; *Holbrook v. Henderson*, 4 *Sandford's (New York) Rep.*, 631.

<sup>2</sup> *Halleck, Intern. Law*, p. 234.

*Passage during war.*

**137.** If the nation through whose territory the right

of transit is desired be at war, the minister must first obtain from it a safe conduct or passport.

This rule is from *Halleck*, p. 232, extended so as to require the authority to be obtained even where his own nation is not one of the belligerents.

*The same.*

**138.** A public minister who enters the territory of a nation at war, without obtaining the authorization required by the last article, or departs from the line prescribed for his transit, may be arrested and conducted to its frontier.

*Halleck*, p. 234.

*Exemptions of person and property.*

**139.** The person<sup>1</sup> of a public minister within the territory of the nation to which he is sent, or within that through which in going or returning he passes in the usual course, and the movables in such territory belonging to him, or in his official charge,<sup>2</sup> are exempt from the jurisdiction of such nation, subject to the exceptions mentioned in this Title.

The formalities requisite for his unofficial acts are subject to the same rules as those of other persons.<sup>3</sup>

<sup>1</sup> Jurisdiction is excluded, though neither his person nor his personal property is touched by the suit. *Magdalena Co. v. Martin*, 2 *Ellis & Ellis' Rep.*, 94. The right of the minister of the Netherlands at Washington to decline to testify was admitted by the United States; and on their application to his government, the latter declined to instruct him to appear. *Dana's Wheaton*, § 235, note 125.

<sup>2</sup> *E. g.*, the archives of his mission. *Torladé v. Barrazo*, 1 *Miles' (Pennsylvania) Rep.*, 378; *Holbrook v. Henderson*, 4 *Sandford's (New York) Rep.*, 632.

<sup>3</sup> It is proposed by this to abolish the existing rule that in transactions relating to his movables, (*Heffter, Droit Intern.*, § 42; *Klüber, Droit des Gens*, § 209,) or his personal rights or relations, a public minister is not bound to adopt the formalities required by any other nation than that by which he is accredited. 1 *Felix Droit International Privé*, p. 416, no. 210.

*Duration of exemptions.*

**140.** The exemption to which a public minister is entitled in respect of his person, property and family, official and personal, commences from the time when



the nation from which the exemption is claimed has notice of his character,<sup>1</sup> and continues with his powers until his death,<sup>2</sup> or, in other cases, until a reasonable time has elapsed after his powers have terminated,<sup>3</sup> except as provided in the next two articles.

<sup>1</sup> Thus, if he is a resident at the time of his appointment, his exemption dates from the time of the receipt of his credentials. *Klüber*, § 203, note f.

<sup>2</sup> *Attorney General v. Kent*, 1 *Hurlstone & Coltman's Rep.*, 12; *Magdalena Co. v. Martin*, 2 *Ellis & Ellis' Rep.*, 114, by Lord CAMPBELL, C. J.

<sup>3</sup> In *Torladé v. Barrazo*, 1 *Miles' (Pennsylvania) Rep.*, 379, twenty-two days were considered a reasonable time. Some authorities, however, state that his personal property is not exempt after the termination of his powers. *Marten's Law of Nations*, Bk. VII., ch. 5, § 3, Cobbet's Translation, 1795.

### *Exceptions as to exemptions.*

**141.** Upon a change in the dynasty or form of government, or the death, deposition or abdication of the sovereign of the minister's nation, and an exclusive recognition of the new government by the nation to which a public minister is accredited, the courts of such nation have jurisdiction to compel the delivery to his successor of such archives of his mission,<sup>1</sup> and other property in his official charge, as may be found within its territory.

<sup>1</sup> See *Torladé v. Barrazo*, 1 *Miles' (Pennsylvania) Rep.*, 378, where the court avoided a decision on this point.

### *The same.*

**142.** The nation to which a public minister is accredited may fix a reasonable time from the termination of his powers, at the end of which the exemptions to which he is entitled shall cease.

*Halleck*, p. 235.

### *Dwelling-house.*

**143.** The actual dwelling-house of a public minister is exempt from the jurisdiction of the nation to which he is sent,<sup>1</sup> but can not be used as an asylum, except for the protection of members of his nation<sup>2</sup> against in-

vasions of rights secured to them by this Code, or by special compact, or for the protection of members of a nation on whose behalf his friendly offices are interposed.

<sup>1</sup> 2 *Phill. Intern. Law*, pp. 193, 210 ; *Lawrence's Wheaton*, p. 400 ; *United States v. Jeffers*, 4 *Cranch's U. S. Circuit Court Rep.*, p. 704. Other immovables of a minister are not exempt. 2 *Phill. Int. Law*, p. 192.

<sup>2</sup> 2 *Phill. Int. Law*, pp. 211-213. A crime committed in a minister's hotel, by a person not belonging to his family, official or personal, although by a member of his nation, is within the jurisdiction of the nation to which he is sent. Case of Mitchencoff, X. *Sol. Journ.*, 56. The right of asylum is denied in general terms by 2 *Felix, Dr. Int. Privé*, p. 293, § 576 ; *Heffter*, § 63. \*

Perhaps the office should be also included.

*Family, official and personal.*

144. The members of the family, official and personal, of a public minister, are exempt from the jurisdiction of the nation to which he is sent, or through the territory of which they pass in company with him, to the same extent as is his person.

*Servants.*

145. The last article does not extend to a person taken into the service of the minister, and belonging to a nation by the law of which such person is incapable of making such contract of service, or prohibited from making it.

9 *Opinions of U. S. Attorneys-General*, 7. The absence of such a provision would enable the minister to employ "any discontented wife, . . . rebellious child, . . . the soldiers of a garrison, . . . the sailors from a ship, . . . or a felon."

*Waiver of privileges.*

146. The privileges of a public minister, and of such of his official family as are appointed by the direct action of the government which he represents, can not be waived by him, except so far as to submit to the jurisdiction of a foreign nation in matters not involving an interference with his person or personal property.

*Taylor v. Best*, 14 *Common Bench Rep.*, 487 ; 2 *Phill. Int. Law*, 197 ; *United States v. Benner*, *Baldwin's Rep.*, 234.

*The same.*

147. The privileges of the family, official and personal, of a public minister can not be waived by any of

them ; but may be waived by him,<sup>1</sup> except as otherwise declared in article 146.

<sup>2</sup> *Phill. Int. Law*, 196.

<sup>1</sup> *1 Félix, Dr. Intern. Privé*, p. 417, note b.

### *Property in trade.*

**148.** The property of any member of the family of a public minister, invested in trade, is subject to the jurisdiction of the nation within whose territory it is situated.

This exception to the general rule of immunity does not extend to ministers themselves. See *Taylor v. Best*, 14 *Common Bench Rep.*, 487.

### *Returning minister.*

**149.** The nation of a public minister can not deprive him of his privileges as a returning minister, without his consent.

In *Torladé v. Barrazo*, 1 *Miles' (Pennsylvania) Rep.*, 366, 385, it was held, that the institution of an action of trover to recover the archives of the mission, by the *chargé* of a newly recognized government against his predecessor, did not *ipso facto* divest the defendant of such privilege.

### *Domicil.*

**150.** The domicil of a public minister is not changed by his appointment,<sup>1</sup> or by any of his acts done while his powers continue.<sup>2</sup>

<sup>1</sup> This rule applies to the case of a person domiciled at the time of his appointment in the territory of the nation to which he is accredited. *Westlake, Private Intern. Law*, § 47; *Attorney-General v. Kent*, 1 *Hurlstone & Coltman's Rep.*, 12.

<sup>2</sup> *Félix, Dr. Int. Privé*, vol. I., p. 418, § 211; *Heath v. Samson*, 14 *Beavan's Rep.*, 441.

### *Jurisdiction of his own nation.*

No person, by reason of being a public minister, or a member of the family of a public minister, is exempt from the jurisdiction of the nation of which he is a member, except to the extent of freedom from arrest on civil process.

### *High crimes.*

**152** In case of the commission of a high crime by a public minister, or by one of his family, in a foreign

country, the nation in whose territory the offender is found, may compel him to leave it ; and may use any degree of force necessary to secure his departure.

*Lawrence's Wheaton*, p. 395 ; 2 *Fœlix, Dr. Int. Privé*, § 576, p. 293 ; *Heffler*, § 206.

### *Arrest of criminal act.*

**153.** Any person or nation may arrest any act of criminal violence on the part of a public minister, or any of his family ; and may use any force necessary to prevent the commission of such act.

2 *Phill. Int. Law*, p. 185 ; *United States v. Liddle*, 2 *Washington's U. S. Circuit Court Rep.*, p. 205 ; *United States v. Ortega*, 4 *Id.*, 537 ; *Lawrence's Wheaton*, p. 395.

### *Right to punish family.*

**154.** A public minister has no power to inflict criminal punishment upon any of his family ; but, with the consent of the nation in whose territory he is, he may use any necessary force to send home any of them charged with crime.

See *Halleck*, p. 220.

### *Taxes.*

**155.** It is the duty of a public minister to pay taxes and assessments imposed upon his property for its benefit ;<sup>1</sup> but this duty can not be enforced by any nation whatever, by means of any process against his person,<sup>2</sup> nor by the nation to which he is sent, by means of any process against such of his property as is exempt from its jurisdiction.<sup>3</sup>

<sup>1</sup> Recent treaties give *consuls* a more liberal exemption. See Preliminary Note to Section IV. of next Chapter.

<sup>2</sup> 1 *Twiss, Law of Nations*, § 203.

<sup>3</sup> *Id.* ; *Klüber*, § 205.

### *Importations.*

**156.** A public minister is entitled to import articles for the use of himself and his family, official and personal, to a reasonable extent, free of duty.

See *Lawrence's Wheaton*, p. 416 ; *Attorney-General v. Thornton*, 1 *McClelland's Rep.*, pp. 600, 607.

It is sometimes said, that he may be required in the first instance to pay the duty, but that it can not be enforced by seizure or legal process. This, however, does not seem reasonable.

*Bearers of dispatches.*

157. Bearers of dispatches to or from a public minister, provided with passports, or other evidence of their character,<sup>1</sup> have the same privileges as members of his family accompanying him, for such length of time as may be necessary to enable them to perform their duties as such.<sup>2</sup>

<sup>1</sup> *Heffter*, § 204.

<sup>2</sup> *Lawrence's Wheaton*, p. 417 ; 2 *Phill. Int. Law*, 196, § 186.

*Reparation for violence to property.*

158. The nation within whose jurisdiction an act of violence is committed upon the exempt property of a public minister, is bound to make reparation therefor, although done by a person who was at the time ignorant of its character.

In *United States v. Hand*, 2 *Washington's U. S. Circuit Ct. Rep.*, p. 435, it was held, that an attack upon a minister's house is not a crime by the law of nations, unless the aggressor knew that it was the domicile of the minister. Such ignorance would be no excuse for an assault upon his person. *United States v. Liddle*, 2 *Id.*, 210 ; *United States v. Ortega*, 4 *Id.*, 537 ; *United States v. Benner*, 1 *Baldwin's Rep.*, 234. To the contrary, *Heffter*, § 204 ; *Vattel's Law of Nations*, Bk. IV., ch. XVII., § 82.

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## CHAPTER XIII.

## CONSULS.

## SECTION I. General provisions.

II. Authorization.

III. Powers.

IV. Immunities.

## SECTION I.

## GENERAL PROVISIONS.

ARTICLE 159. "Consul" defined.

160. Classes of consuls.

*"Consul" defined.*

159. A consul is an agent appointed, by authority of one nation, to reside within the territory of another nation, for the purpose of facilitating commerce. The word "consul," as used in this Code, designates any person empowered to exercise, for the time being, the consular functions.

*Classes of consuls.*

160. The various classes of consuls, and their relative rank and powers, are fixed by their respective nations.

It is hardly necessary to define in this Code a fixed scheme of classification for consular officers, any further than the distinctions between principal and subordinate officers, and between temporary and permanent officers, are recognized in the following Articles:

The consular body in France is composed of : 1. Consuls-General ; 2. Consuls of the first and second class ; 3. Consular pupils, (*eleves consuls*.) See Report of Mr. Bigelow, Feb., 1864, quoted in *United States Consular Regulations*, (1868,) p. 179, note.

By the *United States Consular Regulations*, (1870,) Art. I., ¶ 1, the Consular service of the United States consists of the following officers : Agents and Consuls General ; Consuls General ; Vice-Consuls General

Deputy Consuls General; Consuls; Vice-Consuls; Deputy Consuls; Consular Agents; Commercial Agents; Vice-Commercial Agents; Consular Clerks; and Office Clerks.

Agents and Consuls General, Consuls General, Consuls and Commercial Agents, are full, principal and permanent Consular Officers, as distinguished from subordinates and substitutes.

Deputy Consuls and Consular Agents are Consular Officers subordinate to such principals, exercising the powers and performing the duties within the limits of their Consulates; the former at the same ports or places, and the latter at ports or places different from those at which such principals are located.

Vice-Consuls General, Vice-Consuls and Vice-Commercial Agents are Consular Officers who are substituted temporarily to fill the places of Consuls-General, Consuls or Commercial Agents, when they are temporarily absent or relieved from duty.

Consular Clerks are recognized by the Act of Congress, June 20, 1864, 13 *U. S. Stat. at L.*, p. 139, § 2. The class of Office Clerks is authorized only in unsalaried Consulates.

The class of Consular Pupils is recognized by the consular convention between the United States and France, Feb. 23, 1853, 10 *U. S. Stat. at L.*, (*Tr.*) 114, 121; by which convention, and by that between France and Brazil, Dec. 10, 1860, (8 *De Clercq*, 153, Art. II.,) it is provided that Consular pupils shall enjoy the same privileges and immunities of the person as Consuls, &c.

Commercial Agents are peculiar to the service of the United States, and seem to be employed in lieu of Consuls, either for reasons of convenience in the formalities of appointment; or, to avoid the necessity of recognizing a *de facto* government, by requesting an *exequatur*. *U. S. Consular Regulations*, (1868,) pp. 156-8.

By Article 169, the immunities of Consuls would be confined to those holding an *exequatur*.

“By whatever name,” says *Halleck*, (*Intern. Law*, p. 241, § 3,) “these officers are designated, their powers and duties in Christian countries are essentially the same.”

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## SECTION II.

## AUTHORIZATION OF CONSULS.

- ARTICLE 161. Duty of nations to receive consuls.  
 162. Exclusion of consuls.  
 163. Forbidding consuls to engage in business.  
 164. Appointment of subordinates.  
 165. Commission required.  
 166. Formal act of permission required.  
 167. Exception as to temporary consuls.  
 168. Notifying appointment to local authorities.  
 169. Notifying permission.

*Duty of nations to receive consuls.*

**161.** Any nation may appoint consuls in all the ports, cities and places of any other nation ; subject to the right of the latter to exclude the consuls of all nations whatever<sup>1</sup> from places where it may not be convenient to recognize such officers.<sup>2</sup>

Convention between the United States and Italy, Feb. 8, 1868, 15 *U. S. Stat. at L.*, (Tr.), 185, Art. I. ; and other treaties of the United States.

Consular convention between France and Austria, Dec. 11, 1866, 9 *De Clercq*, 669, Art. I.

Treaty of friendship, commerce and navigation between France and Honduras, Feb. 22, 1856, Art. XIX., 7 *De Clercq*, p. 10.

New Granada, May 15, 1856, " XXIII., 7 *Id.*, 102.

And other treaties of France.

<sup>1</sup> By this provision, the nations uniting in this Code would not be excluded from any ports in other such nations to which consuls from any nations, whether parties to the Code or not, are admitted. This is the principle of the treaties.

<sup>2</sup> Exclusion in case of war is provided for in Book Second of this Code.

*Exclusion of consuls.*

**162.** A nation may withdraw its permission from the consuls of all nations whatever, at any place, upon communicating the reasons for so doing to the nations parties to this Code, whose consuls are thereby excluded.

Suggested by the treaty of friendship, commerce and navigation between France and Peru, March 9, 1861, Art. XXX., 8 *De Clercq*, 193.



*Forbidding consuls to engage in business.*

**163.** A nation may at any time forbid consuls received by it to engage in business.

The French law forbids the consuls of France to carry on any business, and it should seem proper to reserve the right to a nation receiving consuls to impose similar restrictions. *Guide Pratique des Consulats*, vol. 1, p. 66.

*Appointment of subordinates.*

**164.** A nation may authorize its consuls,<sup>1</sup> resident within the territory of another nation, or its public ministers<sup>2</sup> accredited thereto, to appoint vice-consuls, and other subordinate or temporary consular officers, and to remove the same.<sup>3</sup>

<sup>1</sup> Convention between the United States and

France, Feb. 23, 1853, Art. V., 10 *U. S. Stat. at L.*, (Tr.,) 114.

Italy, Feb. 8, 1868, " VIII., 15 *Id.*, (Tr.,) 185.

Belgium, Dec. 5, 1868, " VIII., *U. S. Cons. Reg.*, (1870,) ¶ 500.

Consular convention between France and

Austria, Dec. 11, 1866, Art. VII., 9 *De Clercq*, p. 669.

Portugal, July 11, 1866, " IV., 9 *Id.*, 582.

<sup>2</sup> Treaty of friendship, commerce and navigation between France and Peru, March 9, 1861, 8 *De Clercq*, 193; *Instructions to Diplomatic Agents of United States*, Art. XXIV.

<sup>3</sup> The power of removal is not found to be expressly sanctioned in the books; but it seems proper that the tenure of such subordinate officers should be subject to the pleasure of the appointing power.

*Commission required.*

**165.** A consul must produce a suitable commission from the authority by which he is appointed.

<sup>2</sup> *Phillimore, Intern. Law*, pp. 240, 241.

The commissions of vice-consuls and consular agents, appointed by a consul or consul-general, are issued by the latter, according to the treaty between the United States and Italy, Feb. 8, 1868, 15 *U. S. Stat. at L.*, (Tr.,) 185, Art. VIII.

*Formal act of permission required.*

**166.** A consul can perform no official act until he has received<sup>1</sup> from the nation of his residence a formal act of permission.<sup>2</sup> Such permission, when issued, must be free of charge.<sup>3</sup>

<sup>1</sup> *Halleck, Int. Law*, p. 242, § 4; *Bluntschli, Droit Int. Cod.*, § 246, note.

Treaty between the United States and Honduras, July 4, 1864, 13 *U. S. Stat. at L.*, 699, Art. X. *The United States Consular Regulations*, (1868.)

pp. 189, 190, on this point, sanction his acting as commercial agent, by consent of the local authorities, before receipt of his *exequatur*.

<sup>2</sup> *Exequatur*. 2 *Phill. Int. Law*, 241. This is in various forms in different countries. *Lawrence's Wheaton*, p. 423, note 143.

The more common form of *exequatur* in use in France, England, Spain, Italy, the United States, Brazil, &c., is by letters patent signed by the executive head of the nation, and countersigned by the minister of foreign affairs. In other countries, as in Russia and Denmark, the consul simply receives notice that he is recognized, and that the necessary orders have been given to the local authorities at his residence. In Austria, *exequatur* is simply written upon his commission, and authenticated by the Emperor's seal. *Guide Pratique des Consuls*, vol. 1, p. 134.

The *exequaturs* of French consuls are asked for and sent to their destination by the French minister accredited to the nation of the consul's residence. *Guide Pr. des Cons.*, vol. 1, p. 135.

<sup>3</sup> By the general usage, *exequaturs* are issued free of charge. They are required to be furnished free of charge, by the treaty between the United States and

Italy, Feb. 8, 1868, Art. II., 15 *U. S. Stat. at Large*, (Tr.), 185.

Denmark, April 26, 1826, " IX., 8 *Id.*, 342.

France, Feb. 23, 1853, " I., 10 *Id.*, (Tr.), 115. See 8 *Id.*, 106.

Belgium, Dec. 5, 1868, " II., *U. S. Cons. Reg.*, (1870,) ¶ 500.

New Granada, May 5, 1850, " II., 10 *U. S. Stat. at L.*, 900.

Portugal imposes the same charge as is required by the nation of the consul in question. England, Italy, Spain and Brazil impose charges ranging from forty to four hundred and fifty francs. *Guide Pr. des Cons.*, vol. 1, p. 138.

### *Exception as to temporary consuls.*

**167.** The last two articles do not apply to subordinate officers temporarily acting in the cases authorized by article 106.

The French rule requires an *exequatur* for the consular agents commissioned by consuls, but not for consular pupils, chancellors, interpreters, clerks, or other secondary officers, nor for temporary incumbents discharging the functions of the office during vacancy. *Guide Pratique des Consuls*, vol. 1, p. 137.

### *Notifying appointment to local authorities.*

**168.** A consul,<sup>1</sup> on arriving at his post or receiving his commission there, must notify his appointment to the authorities of the city port or place constituting his district.

<sup>1</sup> The appointment of a deputy consul or consular agent must be notified to the local authorities of the place where he is to act. Without their recognition of his appointment, it would be improper for a deputy-

consul to communicate officially with them. *United States Consular Regulations*, (1868,) p. 154.

*Notifying permission.*

**169.** A consul receiving a formal act of permission, must notify the same to the authorities mentioned in the last article.<sup>1</sup>

From the time of such notification only, he is entitled to the immunities provided in this Chapter.<sup>2</sup>

<sup>1</sup> The treaty of friendship, commerce and navigation between France and Peru, March 9, 1861, Art. XXX., (8 *De Clercq*, 193,) requires that consuls, vice-consuls, or simple consular agents, must also notify their appointment to the local authorities of the place of their *exequatur*. It is the usage of some governments to give this notice to the local authorities themselves, so that the consul is not charged with the duty. *Guide Pr. des Cons.*, vol. 1, p. 135.

<sup>2</sup> On the exhibition of the *exequatur*, consuls shall enjoy the rights, prerogatives and immunities which are granted, Convention between the United States and Italy, Feb. 8, 1868, 15 *U. S. Stat. at Large*, 185, Art. II.

## SECTION III.

### POWERS OF CONSULS.

**ARTICLE 170.** Powers conferred or defined by this Code.

- 171. Protection of members of friendly nation.
- 172. Non-contentious jurisdiction.
- 173. Other powers may be conferred.
- 174. Certified copies of consular acts.
- 175. Authority presumed.
- 176. Protection of rights, and complaints against wrongs.
- 177. Diplomatic character.
- 178. Termination of powers.
- 179. Powers not terminated by change of government.

*Powers conferred or defined by this Code.*

**170.** A consul has power :

1. In reference to deserters, in the cases and to the extent mentioned in Section II. respecting EXTRADITION OF DESERTERS, of Chapter XVIII., entitled EXTRADITION ;

2. In reference to the administration of estates, in the

cases and to the extent mentioned in Chapter XXVI., entitled RIGHTS OF PROPERTY ;

3. In reference to wrecks, in the cases and to the extent mentioned in Chapter XXVII., entitled WRECKS ;

4. In reference to marriage, in the cases and to the extent mentioned in the Chapter entitled MARRIAGE, of the Title respecting THE CONDITION OF PERSONS, in Part V., concerning PRIVATE RIGHTS OF PERSONS ;

5. In reference to the sale of ships and adjustment of average, in the cases and to the extent mentioned in the article entitled *Authorizing Sale of Wrecked Property*, in Chapter XXVII., concerning WRECKS and in the article respecting *Consular Power*, in Chapter XXXIV., entitled GENERAL AVERAGE ;

6. In reference to judicial proceedings affecting members of his nation, in the cases and to the extent mentioned in the article respecting *Power of consuls to appear for members of his nation*, in the Title concerning JUDICIAL POWER, of Part VI., entitled ADMINISTRATION OF JUSTICE ; and,

7. In reference to controversies, order and discipline on board ship, in the cases and to the extent mentioned in the article respecting *Judicial power of consuls*, in the Title concerning JUDICIAL POWER, of Part VI., entitled ADMINISTRATION OF JUSTICE.

*Protection of members of friendly nation.*

171. A consul may exercise the powers mentioned in the last article, for the protection of the rights of person and property of members of any friendly nation whatever, which has no public agent at the same place.

*Guide Pratique des Consulats*, vol. 1, p. 376.

The power does not extend to ordinary notarial acts.

*Non-contentious jurisdiction.*

172. A consul has power, subject to such qualifications as may be contained in the laws or instructions of his government, to take and authenticate, at any place within his district :

1. Affidavit and depositions by any inmate of a ship

of his nation, or by any member of his nation and affidavits and depositions by any person whatever, affecting the interests of a member of his nation ;<sup>1</sup>

2. Contracts, transfers, or other instruments to which a member or domiciled resident<sup>2</sup> of his nation is a party ;

3. Wills made by members of his nation, or which, by the provisions of this Code, may be made according to the law of such nation ;

4. Contracts and transactions by or between any parties whomsoever, which relate to property situated or transactions to be had within the jurisdiction of the consul's nation ;

5. Protests, declarations, and other notarial acts affecting his nation, or members, or domiciled residents thereof, such as a notary public within his nation may perform ;<sup>3</sup> and also,

6. To execute commissions,<sup>4</sup> issued out of the courts of his nation, for taking the testimony of witnesses within his district ; and for this purpose he shall have the right to call upon the local authorities of his district to compel the attendance of witnesses and their depositions.

The first four subdivisions are suggested by treaties, of which the following will serve as examples. The provision in the treaty between the United States and Italy, on this subject, (15 *U. S. Stat. at L.*, (Tr.), 185, Art. X.,) is to the following effect :

Consuls-general, consuls, vice-consuls and consular agents may take, at their offices, at their private residences, residence of the parties, or on board ship, the depositions of the captains and crews of vessels of their own country, of passengers on board of them, and of any other citizen or subject of their nation. They may also receive, at their offices, conformably to the laws and regulations of their country, all contracts between the citizens and subjects of their country, and the citizens, subjects, or other inhabitants of the country where they reside, and even all contracts between the latter, provided they relate to property situated or to business to be transacted in the territory of the nation to which such consular officer may belong.

Article VII. of the consular convention between France and Portugal, July 11, 1866, (9 *De Clercq*, 582,) provides that :

Consuls and their deputies may take, at the consulate, or at the residence of the parties, or on board vessels, declarations and other acts

which the masters, crew and servants, passengers and members of their nation wish to make or perform, including testaments, and all other notarial acts and contracts of every nature.

It also provides, that such acts shall be drawn up in the form required by the laws of the state of which the consul is a member, subject, however, to compliance with all the formalities required by the law of the country where the act is to receive its execution ; while, if the act has for its object a transaction affecting movables situated in the country where the consul resides, it ought to be drawn up in the forms required and according to the provisions of the law of that country.

By the consular convention between France and Austria, 11 December, 1866, (9 *De Clercq*, p. 669, Art. IX.,) the acts and transactions which consuls may thus take are defined somewhat differently, as including declarations which masters of vessels, &c., and members of their country wish to make ; also all testamentary dispositions by members of their nation, and all other acts of civil right which concern them ; also simple acts conventional between one or more of their own nationality and other persons of the country in which they reside.

The consular convention between France and Brazil, December 10, 1860, (8 *De Clercq*, 153, Art. VI.,) provides, that when these transactions relate to real property situated within the country, a competent notary public shall be called in to unite in the authentication, and to sign the same together with the clerk or consular agent, in order to render the act valid. See *United States Consular Regulations*, (1870,) ¶ 33, and treaties in Appendix No. 1.

<sup>1</sup> *United States Consular Regulations*, (1870,) ¶ 238.

<sup>2</sup> Since the law of the domicile may sometimes apply to the transaction, the rule should be extended to include the acts of domiciled residents.

<sup>3</sup> *United States Consular Regulations*, (1868,) p. 280.

\* It is stated in the *United States Consular Regulations*, (1870,) ¶ 308, that "in such cases the consular officer does not act in his quality of an Agent of the Federal Government, but simply as a citizen of the United States whose local position and character render him available to his fellow-citizens for such services as might have been rendered by a private individual."

This method of taking depositions, in a foreign country, has always been familiar practice in the courts of Admiralty ; and it should seem proper to extend the power to all courts authorized by the consul's nation.

Some of the States of the American Union have made provision by law for the taking of depositions, to be used in suits pending in other States by bringing the deponent within the operation of their own statute against *perjury* ; and national comity seems to require the enactment of similar provisions in all countries.

*Other powers may be conferred.*

**173.** A nation may authorize its consuls :

1. To issue passports<sup>1</sup> to its own members, but to no others;

2. To sanction and verify the emancipation of minors;<sup>2</sup> and,

3. To do any other act consistent with the provisions of this Code, or special compact, for the facilitation of commerce; the promotion of the lawful interests of his nation, and those of its members or domiciled residents; and the protection of property bearing its national character; subject, however, to the control of the nation in which the consul resides.

<sup>1</sup> As provided in the articles on *Passports and Safe-conducts*, and *Effect of Passports*, in Section 1, as to RIGHTS OF RESIDENCE, of Chapter XXV., entitled PERSONAL RIGHTS OF FOREIGNERS.

By the American rule, this power is not exercised by consuls, except in the absence of a public minister. And this comports with the original usage. *Halleck*, p. 252, § 15. *Bluntschli*, however, (§251, note,) thinks the consul the most appropriate of all officers to be vested with the power.

<sup>2</sup> *Bluntschli*, § 266.

*Certified copies of consular acts.*

174. A copy of any instrument which was made or authenticated by virtue of the consular powers, when certified<sup>1</sup> to be a copy by the consul, under his official seal, is admissible before all tribunals and officers as sufficient primary<sup>2</sup> evidence of the original.

Translations into the language of the nation of the consul's residence<sup>3</sup> of any such instruments, or of official documents of his own nation, of every nature, certified in like manner to be translations, are in like manner admissible within the nation of his residence, and with the same effect.

<sup>1</sup> Consular convention between France and

Portugal, July 11, 1866, Art. VII., 9 *De Clercq*, p. 582.

Austria, Dec. 11, 1866 " IX., 9 *Id.*, 669.

And other French treaties.

<sup>2</sup> The consular convention between France and Portugal, July 11, 1866, (9 *De Clercq*, p. 582, Art. IV.,) and the treaty between the United States and Italy, (15 *U. Stat. at L.*, (Tr.,) 185,) make such certified copies evidence *equally* with the originals.

See, also, treaty of friendship, commerce and navigation between France

and Peru, March 9, 1861, Art. XXXIX., 8 *De Clercq*, 193; and the consular convention between France and Brazil, December 10, 1860, 8 *De Clercq*, p. 153, Art. VI.

The French treaties contain a provision, that in case of doubt arising as to the authenticity of a certified copy of such transaction, the consular officer must permit its comparison with the original, on the request of any person interested, and allow him to be present at such comparison.

<sup>3</sup> By the treaty between the United States and Belgium, December 5, 1868, Art. IX., (*U. S. Cons. Reg.*, (1870,) ¶ 500,) the *original* and *copies* of such official documents, when duly authenticated, are made receivable as legal documents in the courts of justice of each of the countries. But it does not seem advisable to extend the rule so far.

### *Authority presumed.*

**175.** Consular acts are presumed to be authorized, by the instructions of the consuls, until the contrary appears.

### *Protection of rights, and complaints against wrongs.*

**176.** A consul may apply to the authorities, whether judicial or executive, within his district, upon any infraction of the provisions of this Code, or special compact between the two nations, affecting his nation on a subject within the scope of his powers;<sup>1</sup> or affecting its members or domiciled residents;<sup>2</sup> or for the purpose of protecting the interests of such nation or persons.

If protection and redress cannot be thus obtained, and there is no public minister of such nation accredited to the government of the country, whether a nation or a colony or transmarine province,<sup>3</sup> in which he resides, he may for the same purposes address such government directly.

Convention or treaty between the United States and Italy, February 8, 1868, 15 *U. S. Stat at L.*, (*Tr.*.) 185, Art. IX.

See *United States Consular Regulations*, (1870,) ¶ 31, and treaties in Appendix No. 1.

Consular convention between France and

Austria, Dec. 11, 1866, Art. VIII., 9 *De Clercq*, p. 669.

Brazil, Dec. 10, 1860, " IV., 8 *Id.*, p. 153.

Portugal, July 11, 1866, " VI., 9 *Id.*, p. 582.

The two latter contain a further provision, that the consuls shall have the right to take all steps which they may judge necessary to obtain full and prompt justice.



See, also, treaty of friendship, commerce and navigation between France and Peru, March 9, 1861, 8 *De Clercq*, 193, Art. XL.

<sup>1</sup> He has not general power to vindicate the prerogatives of his nation ; *e. g.*, to interpose a claim on its behalf in a court of prize, for a violation of its neutral territory. The *Anne*, 3 *Wheaton's U. S. Supreme Ct. Rep.*, p. 435.

<sup>2</sup> He may intervene in court for the protection of the interests of members of his nation, without special authority. *Bello Corrunnes*, 6 *Wheaton's U. S. Sup. Ct. Rep.*, 153; *London Packet*, 1 *Mason's U. S. Circ. Ct. Rep.*, 14; *Robson v. The Huntress*, 2 *Wallace Jr.'s U. S. Circ. Ct. Rep.*, 59.

<sup>3</sup> This right to address the governor of a colony or transmarine province, is authorized by treaty between the United States and the great pashalics of the Turkish empire ; and by a recent treaty between the United States and the Netherlands, Aug. 26, 1852, 10 *U. S. Stat. at Large*, (Tr.), 66. And an extension of the rule to other European nations is suggested in *United States Consular Regulations*, (1868), pp. 35, 36.

Apart from such a rule as this, the consul, in case of grave difficulties arising between him and any authorities of the nation of his residence, is limited to protesting, and should meanwhile remain in his ordinary functions, and await instructions from his government. *Guide Pratique des Consultats*, vol. 1, p. 149.

### *Diplomatic character.*

**177.** A consul has no other diplomatic powers than those mentioned in this Section.

*United States Consular Regulations*, (1870,) pp. 147, 148 ; *Halleck*, p. 242, § 5 ; The *Anne*, 3 *Wheaton's U. S. Supreme Ct. Rep.*, 435.

By the *United States Instructions to Diplomatic Agents*, (§ 23,) consuls are under the direction of the minister or *chargé d'affaires* of the United States, in the country where they respectively reside ; and in the transaction of their official duties they can only address the government of that country through such officer. Several treaties, however, recognize the right to address the government directly in some cases. See note 3, to the last article.

*Bluntschli*, (§ 250,) regards consuls as diplomatic agents when charged with watching the execution of commercial treaties, or with reporting on the state of the country where they reside, &c., &c.

### *Termination of powers.*

**178.** The powers of a consul are terminated, either :

1. By his death ;
2. If appointed for a fixed term, by the expiration of the term ;
3. If serving temporarily, by the resumption of duty by his chief, or by appointment of a new chief ;
4. By the revocation of his appointment by the na-

tion or authority by which it was made, and notice thereof to the consul, to the nation of his residence, and to the local authorities ;

5. By his voluntary withdrawal at any time, and notice thereof to the nation of his residence, and to the local authorities ; or,

6. By revocation of the permission granted by such nation, and notice thereof to the consul, and to his nation.<sup>1</sup>

<sup>1</sup> If the reasons are personal, and for which permission to act might have been refused, according to Article 99, it is sufficient to state the fact, without mentioning particulars.

Treaty or Convention between the United States and

France, February 23, 1853, Art. I., 10 *U. S. Stat. at L.*, 992.

The Netherlands, January 22, 1855, " III., 10 *Id.*, 1150.

New Granada, May 4, 1850, " II., 10 *Id.*, 900.

And see note to Article 135.

Exclusion in case of war is provided for in Book Second of this Code.

*Powers not terminated by change of government.*

**179.** Notwithstanding a change in the government of either nation, or a cessation of diplomatic intercourse,<sup>1</sup> the powers of a consul continue until revoked as provided in the last article.

<sup>1</sup> See *Guide Pr. des Cons.*, v. 1, p. 149.

Consuls not being representatives of the nation, their functions may be continued in such cases.

## SECTION IV.

### IMMUNITIES OF CONSULS.

As to their immunities generally, consuls may be considered as of three classes :

1. Those who neither owe allegiance to, nor have a domicile in, the nation of their residence ;

2. Those who do not owe allegiance to, but have a domicile in, such nation ; the existence of a domicile being indicated either by previous voluntary residence, or by engaging in trade or holding property ; and,

3. Those who both owe allegiance to, and have a domicile in, such nation.

*Halleck*, without defining these classes so precisely as to avoid ambiguity in some cases, states the existing doctrine of exemption as follows:

Those who owe no allegiance, hold no real property, engage in no business, and have no domicile in the country, have the personal exemptions and disabilities of aliens who are mere sojourners.

Those who hold real estate, engage in business, and have a fixed residence, are considered as foreigners domiciled; and the consular privileges do not extend to their property or trade so as to change its national character.

Those who owe allegiance can claim no exemptions enjoyed by others in virtue of alienage, but are entitled to those which pertain to the office and are necessary for the performance of its duties, unless they are excluded by conditions imposed in the *exequatur*.

In view of this classification, and the fact that the ground of consular immunity is simply the facilitation of the consular functions, the following provisions are framed to prescribe a uniform rule of personal immunities in whatever can affect the exercise of consular functions, subject only to such exemptions as may be created by the conditions imposed in the *exequatur*; while, on the other hand, in all that does not hinder the exercise of consular functions, such as taxation, searches of papers not belonging to the affairs of the consulate, attendance as witnesses within a convenient distance, consuls, of whatever class, are left to the rules applicable to their private *status*, whether that of transient foreigners, of domiciled foreigners, of property owners and traders, or of members owing allegiance.

This is, substantially, the doctrine which was declared by Art. XVI. of the treaty between the United States and Sardinia, (1838,) 8 *U. S. Stat. at L.*, p. 518.

Larger immunities have been secured by special compact in the case of non-Christian powers. Some of the earlier treaties exempted consuls from payment of duties on goods brought in for use of their houses and families. Treaty between the United States and Algiers, 1795, 1815 and 1816, 8 *U. S. Stat. at L.*, 136, 227, and 247.

The usual provision of the treaties is to the effect that if consuls exercise commerce, they shall be subjected to the same laws and usages to which private individuals of their nation are subject in the same place.

#### Treaty between the United States and

Hanover,	(1840,)	Art. VI.,	8 <i>U. S. Stat. at L.</i> , 556.
Hanover,	(1846,)	" IX.,	9 <i>Id.</i> , ( <i>Tr.</i> ), 60.
New Granada,	(1846,)	" XXXII.,	9 <i>Id.</i> , ( <i>Tr.</i> ), 94.
Prussia,	(1799,)	" XXV.,	8 <i>Id.</i> , 176.
Prussia,	(1828,)	" X.,	8 <i>Id.</i> , 332.
Russia,	(1832,)	" VIII.,	8 <i>Id.</i> , 448.
Austria,	(1848,)	" IV.,	9 <i>Id.</i> , ( <i>Tr.</i> ), 154.
The Two Sicilies,	(1845,)	" VIII.,	9 <i>Id.</i> , ( <i>Tr.</i> ), 18.
Hawaiian Islands,	(1849,)	" X.,	9 <i>Id.</i> , ( <i>Tr.</i> ), 181.

Treaty between the United States and

Austria, (1829,) Art. X., 8 *U. S. Stat. at L.*, 400.

Portugal, (1840,) " X., 8 *Id.*, 564.

Sardinia, (1838,) " XV., 8 *Id.*, 518,

modified by adding "to which private individuals of their nation are subject in the same place, *in respect of their commercial transactions.*"

The treaty between the United States and France, 1853, (10 *U. S. Stat. at L.*, (Tr.), 114, Art. II.,) gives absolute exemption from direct and personal taxation: but it provides that if consuls are citizens of the country of residence; if they are or become owners of property there, or engage in commerce, they are subject to the same taxes, &c., and, with the reservation of the treatment granted to commercial agents, to the same jurisdiction as citizens owning property or engaged in trade.

The treaty between the United States and Guatemala, 1849, (10 *U. S. Stat. at L.*, (Tr.), 14, Art. XXX.,) and others, also except taxes payable on account of property as well as commerce, for which they are taxable like other inhabitants.

In addition to the treaties cited in this place, others, chiefly earlier in date, contain provisions more or less similar. Such may be found in *De Clercq*, vol. 5, pp. 603, 614, 632; *Id.*, vol. 6, pp. 29, 157, 185, 282, 290, 303, 308, 551; *Id.*, vol. 7, pp. 179, 322, 362, 586; and in 10 *U. S. Stat. at L.*, (Tr.), pp. 45, 80, 95; 11 *Id.*, 591, 650; 12 *Id.*, 1020, 1157. See the *United States Consular Regulations*, (1870,) ¶ 29, and treaties in App. No. 1.

For a statement of the immunities now allowed by European nations to consuls, see *Guide Pratique des Consulats*, vol. 1, p. 12.

ARTICLE 180. Right of passage.

181. Immunities of consuls.

182. Duty as witnesses.

183. Books, papers, &c., not to be seized.

184. Dwelling and office inviolable.

185. General subjection to local law.

### *Right of passage.*

**180.** A consul, who is not a domiciled member of the nation of his residence, 'if he has received the formal act of permission required by article 166, has the right of passage through the territory of the nation of his residence, for the purpose of leaving the country; which right continues for a reasonable time after his powers have terminated.

*Bluntschli*, § 275; *Viveash v. Becker*, 3 *Maule & Selwyn's Rep.*, 297, cited in 2 *Phill. Int. Law*, pp. 260, 268.

<sup>1</sup> A person having a foreign domicil before appointment, does not lose it by residing as consul; and, therefore, it seems that his right of return to his domicil should be secured equally as if he were a foreigner.

*Immunities of consuls.*

**181.** A consul, authorized as provided in the last article,<sup>1</sup> is entitled to the following immunities:

1. From military billetings<sup>2</sup> in his consular dwelling<sup>3</sup> and office;<sup>4</sup>
2. From military and naval service<sup>5</sup> of every kind;
3. From jury and police duty, and all other civil service;<sup>6</sup> and,
4. From arrest on civil process in all cases.<sup>7</sup>

*Taxation*, of any kind, is not included among the immunities allowed by this Code, for reasons stated in the introductory note to this section.

<sup>1</sup> It should seem proper to require an *exequatur* in all cases, as a foundation for the consular immunities; (see Articles 166-169;) though this is not now an universal rule.

The first consular convention between the United States and France, 1788, (8 *U. S. Stat. at L.*, (*Tr.*) 106,) extended the general immunities to vice-consuls and secretaries, though the latter were not required to have an *exequatur*. The convention of 1855, however, (10 *Id.*, (*Tr.*) 116, Art. II,) secures the same to consular pupils and to secretaries, &c., discharging the consular duties *ad interim*.

The treaty between the United States and Hayti, (Nov. 3, 1864,) 13 *U. S. Stat. at L.*, 711, Art. XXXV., extends the immunity from taxes to persons, not being citizens, attached to the service of consuls. And to the same effect, with the additional exemption from public service, is the treaty between the United States and Brazil, 1828, 8 *Id.*, 397.

See, also, the treaty between the United States and

Colombia,	1824,	8 <i>U. S. Stat. at L.</i> , 318.
Denmark,	1826,	8 <i>Id.</i> , 342.
Mexico,	1831,	8 <i>Id.</i> , 422.
Chili,	1832,	8 <i>Id.</i> , 440.
Peru-Bolivia,	1836,	8 <i>Id.</i> , 494.
Venezuela,	1836,	8 <i>Id.</i> , 480.
New Granada,	1846;	9 <i>Id.</i> , ( <i>Tr.</i> ) 94.
Guatemala,	1849,	10 <i>Id.</i> , ( <i>Tr.</i> ) 14.

In order that a nation may retain full jurisdiction over its own members, when appointed consuls by foreign nations, a waiver of immunity, as a condition of granting the *exequatur*, should be required.

<sup>2</sup> 2 *Phill. Int. Law*, p. 244.

Treaty between the United States and

Italy,	Feb. 8, 1868,	Art. III., 15 <i>U. S. Stat. at L.</i> , ( <i>Tr.</i> ) 185.
Hayti,	Nov. 3, 1864,	" XXXV., 13 <i>Id.</i> , 711.

<sup>3</sup> *Halleck*, p. 244, § 8.

<sup>4</sup> The authorities usually speak of the consular dwelling only; but as the dwelling is sometimes separate from the office, the latter is specially mentioned, for it is also entitled to exemption.

<sup>5</sup> *Martens* says, that if necessary, the consul may be required to provide

a substitute; but it should seem better to disallow this qualification. *Guide Dip.*, tome 1, § 74; cited in *Halleck*, pp. 248, 249.

See *United States Consular Regulations*, (1870,) ¶ 30; and treaties in Appendix No. 1.

<sup>6</sup> *Halleck*, pp. 248, 249.

<sup>7</sup> The existing rule only extends this exemption to consuls who do not engage in commerce. 2 *Phill. Int. Law*, 268.

The consular conventions between France and

Brazil, Dec. 10, 1860, 8 *De Clercq*, 153.

Austria, Dec. 11, 1866, 9 *Id.*, 669, Art. II.

Portugal, July 11, 1866, 9 *Id.*, 582, Art. II.

provide that arrest of the person can only be applied in civil cases in causes of action of a commercial nature, where the consul is engaged in commerce.

But it is believed that the necessity for an efficient performance of consular functions, and harmony with the general tendency restricting imprisonment in civil cases, require the adoption of the rule in the text.

Arrest in criminal cases is generally sanctioned by the authorities, and there seems to be good reason for allowing it, notwithstanding the interruption of the consular functions thereby caused. It is an important question, however, whether arrest should be allowed for crimes only, or also for misdemeanors, (*delits*.) The recent treaty between the United States and Italy allows of arrest only for offenses which are crimes by the local law, and punishable as such. The treaty between the United States and France, 1853, (10 *U. S. Stat. at L.*, (*Tr.*,) 114, Art. II.,) is to the same effect. It is understood, however, that the French law generally holds foreign consuls amenable in cases of *delit*.

The latter rule seems preferable, and, therefore, no exemption in criminal cases is specified.

See *U. S. Cons. Reg.*, (1870,) ¶ 27, and treaties in App. No. 1.

### *Duty as witnesses.*

**182.** A consul may be required to attend as a witness in the tribunals of the nation of his residence, within five leagues from the consular office, in the same manner as any other witness.

When the testimony of a consul is required for a tribunal beyond that distance, it must be taken in writing, at the consular office, in the manner prescribed by the law of the place for taking depositions.

This is suggested as, on the whole, a more reasonable and convenient rule than that embodied in many of the treaties.

The convention between the United States and Italy, cited above, provides that no consular officer, who is a member of the nation by which he was appointed, and who is not engaged in business, shall be compelled to

appear as a witness before the courts of the country where he resides. When the testimony of such consular officer is needed, he shall be invited in writing to appear in court ; and if unable to do so, his testimony shall be requested in writing, or to be taken orally, at his dwelling or office ; and it is the duty of the consular officers to comply with such requests without unnecessary delay.

The same treaty also provides that in all criminal cases in which the constitution or laws of the nation secure to persons charged with crimes the attendance of witnesses in their favor, the appearance in court of a consular officer, when required as such witness, shall be demanded, with all possible regard for the consular dignity and the duties of his office.

See *United States Consular Regulations*, (1870,) ¶ 28 ; and treaties in Appendix No. 1.

To similar effect is the treaty of friendship, commerce and navigation between France and Peru, March 9, 1861, Art. XLIII., 8 *De Clercq*, 193.

See, also, consular convention between France and

Brazil, Dec. 10, 1860, Art. II., 8 *De Clercq*, 153.

Austria, Dec. 11, 1866, " III., 9 *Id.*, 669.

Portugal, July 11, 1866, " II., 9 *Id.*, 582.

That between France and Brazil, above, restricts this provision to consular officers and their clerks, who are *members* of the nation by which they are appointed.

### *Books, papers, &c., not to be seized.*

**183.** The local authorities cannot seize, examine, or in any way interfere with the books, papers or other property held by the consul, by virtue of his office.

But a consul engaged in business must keep the books and papers relating thereto separate from those of the consulate ; and they may be examined in the same manner as papers of other persons ; except as provided in the article entitled *Searches and Seizures*, in the Section concerning RIGHTS OF RESIDENCE, of Chapter XXV., entitled PERSONAL RIGHTS OF FOREIGNERS.

*United States Consular Regulations*, (1870,) ¶ 25, and treaties in Appendix No. 1.

By Article 109, an exception to this rule is recognized in the case of national emergencies affecting the existence of the nation.

The treaty between the United States and Italy, 15 *U. S. Stat. at L.*, (Tr.) 185, Art. VI., by which this article is suggested, exempts simply papers deposited in the consulate.

See, also, 2 *Phill. Int. Law*, 245.

To much the same effect is the treaty of friendship, commerce and navigation between France and Peru, March 9, 1861, 8 *De Clercq*, 193, Art. XLV. ; and the consular convention between France and Portugal, July 11, 1866, 9 *Id.*, 582, Art. V.

To the same effect, without, however, the last provision, is the consular convention between France and

Austria, Dec. 11, 1866, Art. V., 9 *De Clercq*, 669.

Brazil, Dec. 10, 1860, " III., 8 *Id.*, 153.

And the treaty of friendship, commerce and navigation between France and Honduras, Feb. 22, 1856, 7 *Id.*, 10, Art. XXI.

*Dwelling and office inviolable.*

**184.** The consular dwelling and office are exempt from the jurisdiction of the nation of his residence,<sup>1</sup> but cannot be used as an asylum,<sup>2</sup> except for the protection of members of the consul's nation against invasions of rights secured to them by this Code,<sup>3</sup> or by special compact, or for the like protection of members of a nation on whose behalf his friendly offices are interposed.

<sup>1</sup> The convention between the United States and Italy, 15 *U. S. Stat. at L.*, (Tr.), 185, Art. VI., declares that the consular offices and dwellings shall be at all times inviolable, and the local authorities shall not, under any pretext, invade them.

See, also, convention or treaty between the United States and Belgium, December 5, 1868, Art. VI., *U. S. Cons. Reg.*, (1870,) ¶ 500. France, February 23, 1853, " III., 10 *U. S. Stat. at L.*, 992.

<sup>2</sup> Convention between the United States and Italy, above, and the treaty of friendship, commerce and navigation between France and Peru, March 9, 1861, 8 *De Clercq*, 193, Art. XLIV.

<sup>3</sup> This exception seems reasonable, under any Code by which the rights of foreigners are defined.

*Levi*, (*International Commercial Law*, vol. 1, Intro., p. xii.,) says, that a " consulate is held to be the territory of the country which the consul represents; and therefore all deeds, and acts done within it, or under " the seal of the consulate, are held as done in England." The conclusion is doubtless sound, but the reason assigned is questionable. The foregoing provisions would not confer any extra-territorial character on the consulate.

*General subjection to local law.*

**185.** Except as provided in this Title, the consular office confers no exemption from the laws and jurisdiction of the country of the consul's residence.

In case a consul is prosecuted, or punished, or deprived of the exercise of his functions, for an offense against the laws of the country of his residence, the offended government must acquaint the consul's nation with its motives for having thus acted.



Treaty between the United States and

Sweden & Norway, July 4, 1827, Art. XIII., 8 *U. S. Stat. at L.*, 346.

Greece, Dec. 22, 1837, " XII., 8 *Id.* 498.

Portugal, Aug. 26, 1840, " X., 8 *Id.*, 560.

Swiss Confederation, Nov. 25, 1850, " VII., *U. S. Cons. Reg.*, (1870.)  
¶ 696.

Numerous treaties provide that consular officers engaged in commerce must submit to the same laws and regulations to which members of the nation in which they reside are required to submit in the same place in respect to the like business. See, for instance, the treaty of commerce and navigation between France and

The free cities of Lubeck, Bremen and Hamburg,	}	March 4, 1865, Art. XIX., 9 <i>De Clercq.</i> 187.
Grand Duchy of Mecklenburg Schwerin—extended to the Grand Duchy of Mecklenburg Strelitz,		June 9, 1865, " XV., 9 <i>Id.</i> , 295.
Russia,		June 14, 1857, " XV., 7 <i>Id.</i> , 278.

## CHAPTER XIV.

### COMMISSIONERS.

ARTICLE 186. Commissioners.

187. Immunities of commissioners.

#### *Commissioners.*

**186.** Agents of intercourse other than those provided for in the last two chapters may be designated as Commissioners.

This designation is given by the United States to their resident diplomatic officers in the Hawaiian Islands, Paraguay, &c. *Lawrence's Wheaton*, 387, note 124.

But an agent, sent with credentials on public business, is by the law of nations a public minister, and the title of agent or commissioner makes no difference. *Vattel's Law of Nations*, Bk. 4, ch. 6, § 75.

#### *Immunities of commissioners.*

**187.** Commissioners have only such immunities as the nation to which they are sent may choose to accord.

*Bluntschli*, § 343 ; *Klüber*, §§ 170-172.

## TITLE IV.

## INTERNATIONAL COMPACTS.

The interpretation and effect of contracts by a nation with parties other than another nation, is provided for by the Chapter on CONTRACTS, in Part V., entitled PRIVATE RIGHTS OF PERSONS.

See a discussion of the consequences of non-execution of the engagements of governments relative to the payment of their public debt, in *Revue de Droit Intern. et de Legis. Comp.*, 1869, vol. 1, no. 2, p. 275.

## CHAPTER XV. Treaties.

## XVI. Informal Compacts.

## CHAPTER XV.

## TREATIES.

## ARTICLE 188. "Treaty" defined.

189. Capacity to conclude treaty.

190. Consent, how communicated.

191. Treaty by state in revolution.

192. Ratification, when necessary.

193. Ratification, when obligatory.

194. Notice of reasons of refusal to ratify.

195. Treaty negotiated contrary to minister's  
full power.

196, 197. Time of taking effect.

198. Treaty interfering with third party.

199. What provisions of this Code may be mod-  
ified by special treaty.

200. Demand of performance, when necessary.

201. Merger of preceding communications.

202. Extinguishment of obligations created by  
treaty.

*"Treaty" defined.*

**188.** The term "treaty," as used in this Code, means a written<sup>2</sup> agreement between two or more

nations for the performance or omission of an act creating, terminating, or otherwise affecting an international right<sup>1</sup> or relation.

<sup>1</sup> The term "conventions," which *Wheaton*, (*Lawrence's ed.*, p. 460,) understands as restricted to executed agreements, seems no longer to be used with any uniformity in this limited sense.

<sup>2</sup> Some authorities state that a treaty must be in writing. See *Klüber*, *Droit des Gens*, § 142; and 2 *Phillimore's International Law*, p. 64, and note m.

<sup>3</sup> *Fiore*, (*Nouveau Droit International*, part I., chs. 1-4,) thinks that a nation cannot by treaty part with any of its essential powers.

### *Capacity to conclude treaty.*

#### **189.** Any two nations can make a treaty.

The ratification of a treaty is a recognition of the nation with which it is made. *Lawrence, Commentaire sur Wheaton*, p. 196.

### *Consent, how communicated.*

**190.** The consent of a nation to a treaty can be signified with effect only in the form,<sup>1</sup> and through the executive or other department, authorized by its law,<sup>2</sup> or through its public minister duly empowered.

<sup>1</sup> *E. g.*, constitutional requirements providing for the concurrent action of several departments. *Klüber*, § 142, p. 181, note, b; *Lawrence's Wheaton*, p. 452, note 151; *Id.*, 457.

<sup>2</sup> *Heffter, Droit International*, § 84.

It is the practice of governments, in the drawing up of their treaties with each other, to vary the order of naming the parties, and that of the signatures of the plenipotentiaries, in the counterparts of the same treaty, so that each party is first named, and its plenipotentiary signs first in the copy possessed and published by itself. And in treaties drawn up between parties using different languages, and executed in both, each party is first named, and its plenipotentiary signs first, in the copy executed in its own language. *Instructions to Diplomatic Agents of United States*. § XX.

In acts between several powers admitting the *alternat*, the order to be followed in signature is decided by lot. Protocol of Treaty of Vienna, Art. VIII., cited in *Lawrence's Wheaton*, p. 380. *Bluntschli*, (*Droit International Codifié*, § 178,) says, that instead of this rule, that of the alphabetic order of the initials of the several States is often followed.

### *Treaty by state in revolution.*

**191.** The executive or other department of a nation which is in a state of revolution, if such department is

not in the peaceable possession of its powers, can make temporary treaties only.

*Klüber, Droit des Gens*, § 142, p. 181, note a.

*Ratification, when necessary.*

**192.** Ratification of a treaty by a nation is necessary to render it binding thereon in the following cases only: <sup>1</sup>

1. Where such ratification is therein expressly made a condition ;

2. Where the treaty is concluded by the executive or other department of the nation, and ratification thereof is, in such cases, required by its law ; <sup>2</sup> or,

3. Where the treaty is concluded through a public minister of the nation who is not authorized to dispense with such ratification, or who, being thus authorized, does not expressly dispense with the same. <sup>3</sup>

<sup>1</sup> Several authorities apparently contend that ratification is necessary in all cases ; *Lawrence's Wheaton*, p. 452, note 151 ; or at least in all cases of treaties signed by plenipotentiaries. Speech of M. Guizot, *Moniteur*, Feb. 1, 1843 ; 1 *Ortolan, Diplomatie de la Mer*, 85-89.

The rule uniformly followed in Great Britain, is, that a treaty does not become absolutely binding upon the signatories until it has been ratified. Speech of Mr. Gladstone, in Parliament, Aug. 10, 1870.

<sup>2</sup> *Lawrence's Wheaton*, p. 455.

<sup>3</sup> 1 *Fiore, Nouv. Droit Intern.*, 476. Ratification is sometimes expressly dispensed with by a secret protocol annexed to the treaty, (*Lawrence's Wheaton*, p. 454,) and consequently forming part of it. It may be thought better to modify subdivision 3, by inserting "therein" before "expressly."

*Ratification, when obligatory.*

**193.** A nation by whose public minister a treaty is concluded in conformity with his powers, is bound to ratify the same, if his powers contain an express agreement, authorized by the law of the nation, that it shall be ratified when so concluded ; unless by the terms of the treaty its ratification is optional with such nation ; or unless, before the time agreed on for its ratification, an event has occurred or been discovered which if occurring or discovered after

its ratification would authorize such nation to rescind or refuse to perform it.

*Notice of reasons of refusal to ratify.*

**194.** Where ratification is refused pursuant to the provisions of the last article, notice of such refusal, stating the reasons thereof, must be forthwith given to the other parties to the treaty.

*Treaty negotiated contrary to minister's full power.*

**195.** The negotiation of a treaty by a public minister not in accordance with his powers<sup>1</sup> creates no obligation on the part of his nation to ratify it.

<sup>1</sup> Even if the full power contains a promise to ratify all his acts. *Lawrence's Wheaton*, p. 447.

*Time of taking effect.*

**196.** A treaty which is binding on a nation without ratification, is binding from the date of its signature, unless therein otherwise expressed.

*The same.*

**197.** A treaty which requires ratification binds the ratifying nation from the time of ratification,<sup>2</sup> unless therein otherwise expressed.

<sup>1</sup> The present rule makes ratification retroact as regards the nation, but not as to persons and things within its jurisdiction. *Lawrence's Wheaton*, p. 453, note 152.

The Supreme Court of the United States, in the case of *Jecker v. Magee*, held, that the principle of relation which, as respects the rights of either government, regards a treaty as concluded from the date of its signature, does not apply to private rights under it. As affecting these, it is not considered as concluded but from the exchange of ratification. *New York Transcript*, August 18, 1870.

<sup>2</sup> This is the case, independently of any auxiliary legislation necessary to carry the treaty into effect, unless otherwise provided therein. *Lawrence's Wheaton*, p. 457.

*Treaty interfering with third party.*

**198.** If a treaty interferes with the rights, under a pre-existing treaty, of a nation other than a party to the new treaty, it is, to the extent of the interference, valid, as to such nation, only so far as it submits to the execution thereof.

*Bluntschli*, § 414.

*What provisions of this Code may be modified by special treaty.*

**199.** Any two or more nations may, by special compact, modify the application of any of the provisions of this Code, in respect to themselves, and persons and things within their exclusive jurisdiction, but not in respect to the other parties to the Code, or their members.

No treaty between two or more nations should absolve either from obligations to other nations created or defined by the Code.

*Demand of performance, when necessary.*

**200.** Except in respect to an act therein stipulated to be performed at a certain time, the performance of a treaty must be demanded before any nation, party thereto, can be placed in default.

*Heffter*, § 94.

*Merger of preceding communications.*

**201.** All communications, written or verbal, between the parties to a treaty, preceding its signature, and relating to the subject thereof, are merged in the treaty.

This provision is from *Lawrence's Wheaton*, p. 442; extended to written communications, not referred to expressly, or by necessary implication.

*Extinguishment of obligations created by treaty.*

**202.** An obligation created by treaty is extinguished, either,

1. By its full performance; or,
2. By renunciation of the party entitled to performance; or,
3. By the subsequent permanent impossibility of performance, without the fault of the party bound; or,
4. By fulfillment of the conditions, or the expiration of the time, expressed in the treaty for its extinguishment;<sup>1</sup> or,
5. By breach of its conditions by the nation entitled to performance;<sup>2</sup> or,
6. By rescission<sup>3</sup> of the treaty, through common consent.

<sup>1</sup> The effect of changes in form of government, and of division or annexation of nations, is more fully treated in Chapter III., respecting PERPETUITY. *Klüber*, § 145.

<sup>2</sup> The insertion of this clause recognizes the right of a party to a treaty to declare itself released from an obligation imposed thereby, when the other party fails to fulfill the conditions of such obligation. This principle is applicable to contracts, generally. Its application to treaties is, however, disputed; it being claimed that no Power can set aside, amend, or modify treaty stipulations, by its own will, and *without the consent of all the other contracting parties*.

In the matter of the Black Sea, Russia informed the parties to the Treaty of Paris, (March 18-30, 1856,) that a breach of the stipulations for the neutralization of the Black Sea, entitled her to be released from the obligations contained in the treaty, to limit her naval forces to inconsiderable dimensions; and assented to a conference either for a confirmation, or renewal, or modification of the stipulations of the treaty, or for its rescission through common consent.

<sup>3</sup> *Wheaton*, (*Dana's ed.*, § 283,) adds, that treaties may be avoided upon the ground of the mutual error of the parties respecting a matter of fact. It should seem better, however, to leave this and the other cases of rescission to the rules applicable to controversies between nations.

## CHAPTER XVI.

### INFORMAL COMPACTS.

ARTICLE 203. Informal compacts may be made.

204. Ratification of written compacts made by unauthorized agents.

*Informal compacts may be made.*

**203.** Compacts, other than treaties, may be made in writing<sup>1</sup> between nations, without the formality of a treaty.

<sup>1</sup> *Wheaton*, (*Lawrence's ed.*, p. 442,) says, modern usage requires that verbal agreements should be reduced to writing.

*Ratification of written compacts by unauthorized agents.*

**204.** The consent of a nation to an agreement in writing, made on its behalf by a person not authorized, may be given expressly, or by acting under it as if duly concluded and ratified.

*Lawrence's Wheaton.* p. 442.

## TITLE V.

## REMOVAL OF PERSONS.

CHAPTER XVII. Asylum.  
XVIII. Extradition.

## CHAPTER XVII.

## ASYLUM.

- ARTICLE 205. Right of asylum.  
 206. Exclusion of criminals.  
 207. Abuse of asylum.  
 208. Return.  
 209. Obtrusion of convicts, paupers, &c.

*Right of asylum.*

**205.** No nation is bound <sup>1</sup> to surrender a person within its exclusive jurisdiction<sup>2</sup> to any foreign power, except in cases provided for by this Code, or by special compact.

<sup>1</sup> Until recently, the obligation of a nation to deliver up criminals upon the demand of a foreign nation, has been a disputed point; but now the weight of authority seems to be against it.

*Twiss*, (*Law of Nations*, Part I., § 221,) states the rule substantially as above. See also *Lawrence's Wheaton, on International Law*, p. 233; and *Woolsey's International Law*, § 79.

*Bluntschli*, (*Droit International Codifié*, § 395,) says, the obligation to surrender exists only in the case of special treaties, or when the general safety demands it; and in the latter case, it relates only to grave crimes, and demands by a nation whose penal system offers guarantees of impartiality and humanity. See also Section I., as to EXTRADITION OF CRIMINALS, of Chapter XVIII., entitled EXTRADITION.

<sup>2</sup> The right of asylum extends not only to the territory of the nation, but to other places within its exclusive jurisdiction, which are hereafter defined. The application of the rules proposed by the Code would solve



the vexed questions of refugees from ship to shore, and shore to ship, when arising between nations parties to the Code, in the following manner :

Against a public armed ship, a demand for surrender could not be enforced :

In the case of an unarmed ship, private or public, within the jurisdiction of a nation, process of the nation could be executed on board, and therefore a deserter or criminal might be arrested, either for prosecution in the courts of the country, or for surrender to another nation, or its ships.

In the case of deserters from ship to shore, application would have to be made to the local authorities, under the provisions of this Title.

By the existing rule, which would, of course, still be applicable in the case of nations not parties to the Code, a demand for the surrender of a person escaping from a nation to a foreign ship within its waters, must first be made on the officer in command. If he refuse, and the ship is a public armed ship, redress must be sought from his government. If the ship be a private ship, application must be made, after such refusal, to the consul of his nation, or to the public armed ship of such nation stationed at the port : and it is only when such application does not avail, that resort to force can be had. *Guide Pratique des Consultats*, vol. 2, p. 171 ; *Ortolan, Règles Int. et Dipl. de la Mer*, vol. 1, p. 301.

### *Exclusion of criminals.*

**206.** No nation is bound to furnish an asylum to criminals from foreign countries ; and it is for each government, or its authorized officers,<sup>1</sup> to determine the cases, and manner in which such persons shall be excluded or removed.

<sup>1</sup> The commanding officer of a ship of war may expel a refugee, without awaiting proceedings in extradition. *Ortolan, Règles Int. et Dipl. de la Mer*, vol. 1, p. 299.

Every nation has an undoubted *right* to surrender fugitives from other States. No man has a right to say, I will force myself into your territory, and *you shall protect me*. *Commonwealth v. Deacon*, 10 *Sergeant & Rawle's (Pennsylvania) Rep.*, 125.

*Dana* says, that the general tone of the judicial decisions and of political debate in the United States has been adverse to the right of a government, in the absence of treaties and statutes, to surrender a fugitive criminal. *Dana's Wheaton on International Law*, § 115, note [73.]

Such surrender was, however, once made in the United States, in the case of Arguelles, governor of a district in Cuba, who, having sold into slavery a number of Africans who were in his charge as an officer, escaped to New York. There was no extradition treaty between the United States and Spain ; but upon proof of the facts to the Secretary of State, and a request by the Spanish authorities for the arrest and surrender of

Arguelles as an act of favor and comity, not only because of his offense, but also because his presence in Cuba was necessary to the liberation of the Africans he had sold, the Secretary of State, with the sanction of the President, ordered his arrest and surrender, as a purely executive act. The Senate (May 28th, 1864,) inquired of the President under what authority of law or treaty this was done. The response of the Secretary of State took the ground that "although there is a conflict of authorities concerning the expediency of exercising comity towards a foreign government, by surrendering at its request one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender upon a demand therefor, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals, who are offenders against the human race; and it is believed that if in any case the comity could with propriety be practiced, the one which is understood to have called forth the resolution furnished a just occasion for its exercise." *United States Diplomatic Correspondence*, 1864, Part II., 60-74; *Congressional Globe*, 1864.

A resolution introduced into the House of Representatives, condemning this act, as a violation of the Constitution and in derogation of the right of asylum, was rejected by a large majority, and the subject referred to a committee; but it was followed by no further action of Congress. An indictment was found in the State courts against the marshal who made the arrest, charging the act as an offense against the statutes respecting kidnapping; but the case has not been brought to trial. The question involved affected not only the right of the United States, but the right of the President to act, in the absence of a statute; and neither question can be considered settled by the case.

### *Abuse of asylum.*

207. One who uses his asylum for promoting hostilities against a foreign country, may be proceeded against under the law of the nation of his asylum, or may be surrendered to the nation aggrieved.

*Bluntschli*, (§ 398,) states the rule to be, that, in case of abuse of asylum, the nation which has granted the asylum is bound, as toward a friendly nation, to withdraw its permission to the refugee to sojourn upon its territory, or to impose such restrictions as shall preclude all danger to the country of the refugee.

The right of a State to demand that rebellious subjects shall not be allowed to plot against it in the territory of another State, cannot, when stretched to its utmost limit, be extended beyond the point of requiring the foreign State to send the fugitive in safety elsewhere; and the demand can only be legally made when the State has confessed or demonstrated its inability to restrain the fugitive from carrying on plots against the country from which he has fled. *Phillimore's International Law*, vol. I., p. 415.

In the course of debate in the British House of Peers, March, 1853, upon the question of foreign refugees, the Prime Minister stated, that the government had resolved, if any event occurred which gave just ground of complaint to a foreign government against a refugee in England, to take upon itself the prosecution of such individual, and not to throw the burden of it upon the foreign minister.

The principal occasions upon which such a course has been pursued, have been stated as follows :

In 1799, certain English subjects were prosecuted for publishing a libel upon Paul I., Emperor of Russia. They were convicted and punished by fine and imprisonment. *State Trials*, (Howell,) vol. XXVII., 627-630.

In 1803, Jean Peltier, a French refugee, was prosecuted for a libel on Napoleon Bonaparte, then First Consul of the French Republic. He was convicted, but the breaking out of war prevented his receiving judgment. *State Trials*, (Howell,) vol. XXVIII., 530-619.

Woolsey, (*International Law*, § 79,) says : " A nation has a right to harbor political refugees, and will do so, unless weakness of political sympathy lead it to a contrary course. But such persons may not, consistently with the obligation of friendship between States, be allowed to plot against the person of the sovereign, or against the institutions of their native country. Such acts are crimes, for the trial and punishment of which the laws of the land ought to provide, but do not require that the accused be remanded for trial to his native country." See also *Wildman's International Law*, p. 59 ; *Law Lib.*, vol. 52, p. 42.

After the attempt to assassinate the Emperor of the French on the 14th of January, 1858, the French Minister of Foreign Affairs represented that plots to assassinate the Emperor had been formed in England, and asked that England should provide for the punishment of such offenses. In accordance with the request, Lord Palmerston, being Prime Minister, on the 8th of February introduced a bill for the punishment of conspiracies formed in England to commit murder beyond Her Majesty's dominions ; but the bill was rejected, and the ministry immediately resigned. The bill was opposed by some from an unwillingness to interfere in any way with the right of asylum ; but the controlling reason evidently was a feeling that the French government had used too dictatorial a tone in demanding the passage of such a law. *Annual Register*, 1858, pp. 5, 33, 202 ; *Annuaire des deux Mondes*, 1857-8, pp. 32, 110, 420 ; cited in *Larousse's Wheaton*, p. 246, note.

The same application was made to Sardinia, and a law was passed there making it a special offense to conspire against the lives of sovereigns, although the punishment originally proposed in the bill as introduced by the ministers, was mitigated by the Chambers. M. Cavour sustained the measure, both on political grounds and because he deemed it important that Sardinia, under the circumstances in which she was placed, should not act in opposition to the views of France. *Annuaire de deux Mondes*, 1857-8, p. 216.

*Return.*

**208.** Foreign convicts or accused persons, paupers, and persons suffering from mental alienation or from other maladies which give them the right to public relief, who enter a nation, may be sent back by it to the nation of which they are members, at any time while the legal liability or the state of dependence continues, and before they have acquired the national character of the nation into which they have entered.

The declaration between France and Bremen, Oct. 20, 1866, (9 *De Clercq*, 620,) which contains such a provision as to insane, &c., requires each nation to reimburse the expenses of the return of such persons, as well as the expenses occasioned by the sojourn and treatment of its own members in the asylums of the other.

The treaty between France and the Swiss Confederation, June 30, 1864, (9 *De Clercq*, 91,) provides that the members of one nation established in the other, who shall be sent back by legal sentence, or according to the laws or regulations of police respecting morals or mendicity, shall be received at all times with their families in the country of their origin, &c.

By the treaty between the United States and the Swiss Confederation, Nov. 25, 1850, (11 *U. S. Stat. at L.*, 587, Art. III.,) each nation is bound to receive back its members, with their wives and legitimate issue, who have preserved their rights according to its laws, in case they desire to return, or are sent back by judicial decision or act of police, according to the laws regulating morals and mendicity.

*Obtrusion of convicts, paupers, &c.*

**209.** No nation has a right to obtrude persons, such as are mentioned in the last article, upon another nation, or aid or encourage such to emigrate to another nation.

Persons entering a nation contrary to this article, may not only be sent back by it to the nation offending, at the expense of the latter, but the nation aggrieved is entitled to redress for the unfriendly act.

This article is suggested by a letter from Dr. Francis Lieber, (dated September 4, 1869,) to the Secretary of State of the United States, in reference to the obtrusion of *Convicts*. His conclusions are thus stated :

“In my opinion, we stand in need of three things:”

“First, the foul character of the transaction must be openly acknowledged and plainly laid down in the law of nations, which, doubtless, has not been done long ago, because the offense has never before, so far as I know, presented itself so strikingly as in our times of emigration which

resemble, though peaceful, the period of migration of nations which was warlike."

"We ought to stipulate by treaties (the reverse of extradition treaties) with the other governments of our family of nations, that every attempted importation of convicts shall be considered as a grave offense against the law of nations, and a most "unfriendly act," calling for serious remedies; and the writers on the law of nations ought soon to lay down the fair and simple principle in their works. This is one of the ways in which the law of nations advances, and has so nobly advanced in the last hundred years. I have never failed to touch on this principle in my lectures on this the greatest branch of law."

"Secondly, we stand in need of a law of the United States by which it is made penal to introduce convicts into our territory, both for the captain commanding the importing vessel, and by a high fine imposed on the owners of the same; and by which law provision is made that the imported convicts be exported again to the government whence they came, at the expense of said government. A bill of this sort was introduced in February, 1867, by the late H. J. Raymond, then one of our New York representatives, induced to do so by Mr. Frederick Kapp, a foreign-born citizen himself, and one of the most active New York Commissioners of Emigration. The bill, however, was brought in too late, and only passed the House of Representatives."

... "Thirdly, it will be advisable that such a law once having been passed. but the treaties which have been spoken of not yet having been concluded, the United States proclaim openly and declare to every government in amity with the United States, that henceforth our government shall consider the attempted obtrusion of convicts a highly penal act, and if *governments* have anything to do with it, an unfriendly act in the sense of the law of nations which requires satisfaction."

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## CHAPTER XVIII.

### EXTRADITION.

#### SECTION I. Extradition of Criminals.

##### II. Of Deserters.

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## SECTION I.

## EXTRADITION OF CRIMINALS.

The practice of extradition rests upon the principle, that the common interests of all nations require the punishment of great criminals, and demand for that purpose an exception to the general rule that the penal laws of a State are local, and can have no aid from foreign powers.

This Section proposes to combine the penal systems of independent nations sufficiently for common protection against the ubiquity of crime. See *Bluntschli, Droit International Codifié*, § 395, and note.

There is, as has been already observed, a difference of opinion among jurists whether extradition, independent of treaty, is a matter of duty or discretion. If it be simply a matter of discretion, then the refusal to surrender fugitive criminals is no ground of offense to the State demanding it.

The leading authorities are thus epitomized by *Forsyth*, in *Cases and Opinions in Constitutional Law*, p. 369, note :

The former opinion is maintained by Grotius, Herneccius, Burlamqui, Vattel, Rutherford, Schmelzing and Kent ; the latter, by Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeier and Heffter. See *Dana's Wheaton*, § 115, and note 73.

*Woolsey (International Law, § 79)* says : " We conclude that there is a limited obligation of nations to assist each other's criminal justice, which only treaties expressing the views of the parties at the time, can define."

*Heffter, (Droit International, § 63)* says : " Early writers, such as Grotius and Vattel, declared extradition obligatory ; but the negative is held by modern writers, and has prevailed in practice,"

*Phillimore, (International Law, vol. I., 413)* says : " The result of the whole consideration of this subject is that the extradition of criminals is a matter of *comity*, not of *right*, except in the cases of special convention."

*Clarke*, in his treatise upon the *Law of Extradition*, (ch. 1,) from a review of the opinions of jurists, draws the following conclusions :

" The surrender of fugitive criminals is an international duty. It may not be so plainly a matter of right, that the refusal to grant it should subject a nation to the penalty of war ; but such a refusal is so clearly injurious to the country which refuses, and to the whole world, that it is a serious violation of the moral obligations which exist between civilized communities."

" In former times, the surrender was granted by a sovereign, in virtue of his own prerogative ; but the recent course of European legislation has been to restrain this prerogative, and to cast upon the legislature of a country the task of providing for the performance of this duty."

"This provision should be guarded by the exclusion of political offenders, and requirement of some evidence of guilt before the accused person is delivered up. It would be wise also to restrict the offenses for which surrender should be granted, according to the facility with which criminals could escape from one country to another; but to refuse to make provision at all, would be to inflict an injury upon the whole world, and especially upon the country so refusing." See also, 2 *Ward's Law of Nations*, 319.

The provisions of this Section are suggested chiefly by those of existing treaties, particularly the numerous American treaties, and the most recent French treaties; with such modifications as the nature of a general rule requires, and such as are suggested by the recent opinions of jurists and judicial decisions.\*

In addition to the French treaties cited under the articles of this Section, the following, chiefly of an earlier date, may be referred to: *De Clercq*, vol. 5, p. 599; vol. 6, pp. 2, 19, 25, 114, 232, 277, 279, 324, 345, 347, 372, 431, 443, 449, 452, 455, 472, 499, 579, 601; vol. 7, pp. 186, 444, 618; vol. 8, pp. 42, 76; vol. 9, p. 407.

For an instructive history of the American doctrine of extradition, see the Letter of Mr. Lawrence, in the *Transactions of the National Association for the Promotion of Social Science*, 1866, p. 151.

#### ARTICLE 210. Duty of extradition.

211. The requisition.

212. Requisition in case of offense committed on the frontier.

213. Requisition in case of offense within a colony.

214. What criminals are subject to extradition.

215. Exception of certain offenses.

216. Order of arrest.

217. Arrest in anticipation of requisition.

218. Preliminary investigation.

219. Rules for conducting investigation.

220. Documentary evidence.

221. Necessary proof of guilt.

222. Evidence in case of convicted criminals.

223. Inquiry as to real motive of demand.

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\* As the British government have entered into so few treaties of extradition, it is noticeable that *Clarke*, in his *Treatise on Extradition*, gives to the American laws the first place in the history of the Modern Law and Practice of Extradition. He says: "In the matter of extradition, the American law is better than that of any country in the world; and the decisions of the American judges are the best existing expositions of the duty of extradition, in its relations at once to the judicial rights of nations, and the general interests of the civilization of the world."

Several opinions of the United States Attorneys-General, here referred to, will also be found in *Cases and Opinions in Constitutional Law*, by *Forsyth*, pp. 244-366.

**ARTICLE 224.** Conflicting claims.

- 225. Surrender of those under arrest for local offenses may be deferred.
- 226. Surrender, notwithstanding civil arrest.
- 227. Conditional extradition.
- 228. Member of a third nation.
- 229. Surrender, by whom made.
- 230. Surrender in case of offenses committed on the frontier.
- 231. Surrender by colonial government.
- 232. Things in prisoner's possession.
- 233. Second arrest.
- 234. Custody of the prisoner.
- 235. Discharge in case of delay of extradition.
- 236. Limitations of time extended in certain cases.
- 237. Restrictions as to punishment.
- 238. Necessary legislation to be provided.

*Duty of extradition.*

**210.** Each nation, on demand made by another nation, through its supreme executive authority,<sup>1</sup> in the manner provided in this Section, and at the expense of the demanding nation,<sup>2</sup> must deliver up to justice persons<sup>3</sup> who being accused of any of the crimes enumerated in article 214, committed within the jurisdiction<sup>4</sup> of the latter, are found<sup>5</sup> within the jurisdiction<sup>6</sup> of the former.

This article and the next are founded on Article I. of the convention of November 9, 1843, between the United States and France. 8 *U. S. Statutes at Large*, 580 ; and other treaties.

<sup>1</sup> All demands for international extradition must proceed from the *supreme political authority* of the demanding State. 7 *Opinions of U. S. Attorneys-General*, p. 6.

There can be no actual extradition until a proper requisition to that effect has been made by the foreign government to the Secretary of State. Extradition cannot be made upon mere *judicial* documents, for they are not requisitions, but only *proof* upon which the Secretary of State is to act when due requisition shall have been made. 8 *Opinions of U. S. Attorneys-General*, p. 240.

<sup>2</sup> A provision that the expenses of any detention and delivery, effected in virtue of the preceding provisions, shall be borne by the government in whose name the requisition is made, is usual in the treaties. The same rule is stated by *Bluntschli, Droit Intern. Codifié*, § 400.

But where, in consequence of conflict between the judicial authorities of the United States and those of a State, the latter aiming to prevent the



tradition, the United States intervenes to maintain its own dignity in the premises, the special expenses of such intervention should be defrayed by the United States. 7 *Opinions of U. S. Attorneys-General*, p. 396.

<sup>2</sup> As to the exception in favor of citizens or subjects, see Article 215, note 5. As to members of third nations, see Article 228.

<sup>4</sup> It has been said, that to justify the commencement of process in extradition, it must appear that the criminal acts charged were committed within the territorial jurisdiction of the demanding government. 8 *Opinions of U. S. Attorneys-General*, p. 215; 1 *Id.*, p. 83.

But on the construction of the British treaty of extradition, a crime committed at sea, on board of an American vessel, has been considered the same as if committed in the territory of the United States. And it has been considered under the French treaty, that where a crime is committed at sea, it is constructively committed within the territory of the Union, and is to be judged by the Federal judiciary alone, and is, therefore, rightfully a case of extradition. *Lawrence's Wheaton*, p. 242, note. See, also, *Re Bennett*, *Law Times Rep.*, vol. XI., 488. Hence, it seems better to refer to the legal jurisdiction. See Article 309.

<sup>5</sup> The language of some of the treaties is, "persons who seek an Asylum, or are found;" but obviously, the latter circumstance alone should control the case. It is not sufficient to show that the accused sought an asylum, if not found within the territorial jurisdiction; and if he is so found, it is not necessary to show that he was seeking asylum.

An alleged criminal is subject to extradition, notwithstanding that he may have come to the country otherwise than as an apparent fugitive on account of the particular crime; for the treaties apply not only to persons seeking an asylum professedly, but to such as may be found in the country also. 8 *Opinions of the U. S. Attorneys-General*, p. 306.

<sup>6</sup> The treaty between the United States and The Two Sicilies, October 1, 1855, (11 *U. S. Stat. at L.*, 653, Art. XXI.), expressly extends to the case of one seeking asylum on board the vessels of war of the nation on which the demand is made. See treaty between the United States and China, June 18th, 1858, 12 *U. S. Stat. at L.*, 1027, Art. XVIII.

The article, in its present form, defines the right of extradition, as it is now recognized, and extends only to crimes committed within the jurisdiction of the demanding nation.

It may be thought desirable to extend the rule to offenses against the law of a nation, committed beyond its jurisdiction, which it would have power to punish if the offender come within its jurisdiction, and also to offenses against any provision of this Code.

### *The requisition.*

**211.** Except in the cases provided for in the next two articles, a requisition for extradition must be made through the public minister of the demanding nation: or, in his absence from the country or its seat of gov-

ernment, through other agencies of international intercourse,<sup>1</sup> and must be addressed to the officers who, by articles 229, 230 and 231, are empowered to make the surrender.

*Opinions of U. S. Attorneys-General*, p. 240; Convention between the United States and Italy, March 23, 1868, 15 *U. S. Stat. at L.*, (Tr.) 131, Art. V.

Letters permissive, authorizing proceedings of extradition to be instituted in the United States, form in no sense a *judicial* paper of any sort. They are nothing but a political commission, or executive license, to enable the demanding government to go before the courts and proceed to establish a case of extradition in due form of law. Hence a clerical error in such a document does not affect its validity. 8 *Opinions of U. S. Attorneys-General*, p. 420.

<sup>1</sup> For the cases in which consuls may act, see article 176.

*Requisition in case of offense committed on the frontier.*

**212.** In the case of an offense within the jurisdiction of a State or Territory, being part of a nation, and lying along the boundary between two contiguous nations, a requisition may be made, either as provided in the last article, or through the chief civil authority of the frontier State or Territory; or, when, from any cause, the civil authority of such State or Territory is suspended, through the chief military officer in command thereof.

Treaty between the United States and Mexico, December 11, 1861, 12 *U. S. Stat. at L.*, 1200, Art. II.

*Requisition in case of offense within a colony.*

**213.** In the case of an offense within the jurisdiction of a colonial government, the demand for extradition may be made, either as provided in article 211, or by the governor, or chief executive officer of the colony.

Convention for extradition between the French colonies and the colonies of the Netherlands, West Indies, concluded August 3, 1860, between France and the Netherlands, 8 *De Clereq*, 77.

Treaty between Great Britain and Denmark, April 15, 1862. *Accounts and Papers*, 1862, vol. LXIII., (35.).

*What criminals are subject to extradition.*

**214.** The person to be surrendered, on the demand

for extradition, according to the provisions of this Section, must have been convicted,<sup>1</sup> or charged, before the courts, tribunals or criminal magistrates of the demanding nation, with one or more of the following crimes,<sup>2</sup> as now defined in the penal Code of the demanding nation :

Abortion ;<sup>3</sup>

Arson ;<sup>4</sup>

Barratry ;<sup>5</sup>

Bigamy ;<sup>6</sup>

Burglary ;<sup>7</sup>

Counterfeiting ;<sup>8</sup>

Crime against nature ;

Embezzlement ;<sup>9</sup>

False pretenses or false tokens ;

Forgery ;<sup>10</sup>

Kidnapping ;<sup>11</sup>

Larceny ;<sup>12</sup> punishable by the law of the demanding nation by imprisonment exceeding one year ;

Maiming ;

Manslaughter ;

Murder ;<sup>13</sup>

Perjury ;<sup>14</sup>

Piracy ;<sup>15</sup>

Rape ;<sup>16</sup>

Robbery,<sup>17</sup> with violence or intimidation ;

Slave trading ;

Or convicted or charged in like manner with an offense against a provision of this Code, the violation of which is declared to be a public offense.<sup>18</sup>

<sup>1</sup> The American treaties do not generally refer, at least not in express terms, to convicts. The recent treaty between the United States and Italy, however, does so refer.

<sup>2</sup> Mr. Westlake proposes that no enumeration be attempted, but that the broad principle be expressed that "Extradition shall be granted whenever the facts, if they had occurred in the country to which the criminal has escaped, would constitute any crime or offense other than treason or sedition." *Transactions of National Association for Promotion of Social Science*, 1866, p. 150. Mr. Rathbone, on the other hand, urges that acts which are not offenses in both countries, and mere of-

fenses against morality, however outrageous, should not be included. *Id.*, p. 143.

Heretofore the enumeration of crimes for which extradition might be ordered has been fixed with reference to the nature of the intercourse between the nations uniting in the treaty, and the facility with which criminals could escape from one to the other. Such discrimination seems impracticable in a general Code; and of minor importance by reason of the rapidly increasing commercial relations and facilities of intercourse and travel.

One rule is, therefore, here proposed for all the nations uniting in the adoption of this Code, and the offenses included in the article above, are such as the general experience and better opinion mark as proper subjects for extradition. Minor offenses, which require provisions between particular neighboring Powers, can be the subjects of special conventions.

<sup>3</sup> *Abortion*: "*Avortement*."

Convention between France and—

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

And other earlier treaties.

<sup>4</sup> *Arson*. This crime is made the subject of extradition by the following treaties:

Treaty between the United States and			
Great Britain,	Aug. 9, 1842, Art.	X.,	8 <i>U. S. Stat. at L.</i> , 576.
Austria,	July 3, 1856, "	I.,	11 <i>Id.</i> , 692.
Bavaria,	Sept. 12, 1853, "	I.,	10 <i>Id.</i> , ( <i>Tr.</i> ), 175.
The Two Sicilies,	Oct. 1, 1855, "	XXII.,	11 <i>Id.</i> , 652.
Hayti,	Nov. 3, 1864, "	XXXIX.,	13 <i>Id.</i> , 728.
Venezuela,	Aug. 27, 1860, "	XXVIII.,	12 <i>Id.</i> , 1158.
Mexico,	Dec. 11, 1861, "	III.,	12 <i>Id.</i> , 1200.
Dominican Republic,	Feb. 8, 1867, "	XXVIII.,	15 <i>Id.</i> , ( <i>Tr.</i> ), 183.
Hawaiian Islands,	Dec. 20, 1849, "	XIV.,	9 <i>Id.</i> , ( <i>Tr.</i> ), 182.

Convention between the United States and

The King of the	}	Nov. 9, 1843, Art. II.,	8 <i>U. S. Stat. at L.</i> , 582.
French,			
Prussia,		June 16, 1852, "	I., 10 <i>Id.</i> , ( <i>Tr.</i> ), 98.
(Extended to the)	}	Feb. 22, 1868, "	III., 15 <i>Id.</i> , ( <i>Tr.</i> ), 117.
North German			
Confederation,			
Italy,		Mar. 23, 1868, "	II., 15 <i>Id.</i> , ( <i>Tr.</i> ), 130.
King of Sweden	}	Mar. 21, 1860, "	II., 12 <i>Id.</i> , 1126.
and Norway,			
Baden,		Jan. 30, 1857, "	I., 11 <i>Id.</i> , 714.

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

<sup>5</sup> *Barratry.*

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

Where a foreigner conspired in England with the master and mate of a foreign ship to cast away and destroy the same, to the prejudice of the underwriters, and the conspiracy was executed by their sinking the ship off the English coast, it was supposed that the prisoner *could not* be indicted in England for destroying the ship, as he was a foreigner, the ship was foreign, and the offense was committed on the high seas. The offense of piracy or robbery, which is against the law of nations, was not charged. The jury were directed to consider whether the prisoner was a party *in England* to a previous plan or conspiracy to destroy the ship, without reference to its destination on the high seas.

If the conspiracy to destroy was limited to the high seas, it is doubtful whether it would have been a crime. *Regina v. Kohn*, 4 *Foster & Finlason's Rep.*, 68.

<sup>7</sup> *Bigamy.* It has been questioned whether bigamy should be a ground of demand for extradition, except when it is clearly proved that the fact of the first marriage was concealed from the second wife, it then being treated as an injury done, through fraud, to her. *Transactions of National Association for the Promotion of Social Science*, 1866, p. 144.

<sup>7</sup> *Burglary.*

Treaty between Great Britain and

Prussia, Mar. 5, 1864, *Accounts and Papers*, 1864, vol. XLVI., (35.)

Convention between the United States and

The King of France, Feb. 24, 1845, 8 *U. S. Stat. at L.*, 617.

The King of Sweden } Mar. 21, 1860, 12 *Id.*, 1126, Art. II.  
and Norway, }

In the treaty between the United States and Mexico, December 11, 1861, (12 *Id.*, 1200, Art. III.,) burglary is defined, for purposes of the treaty, to be "the breaking and entering into the house of another, with intent to commit felony." And in the convention between the United States and Italy, March 23, 1868, (15 *Id.*, (*Tr.*) 130, Art. II.,) it is defined as such breaking and entering *by night*.

*And the corresponding crimes* included under the French law in the words *vol qualifié*.

Convention between the United States and

The King of France, Feb. 24, 1845, 8 *U. S. Stat. at L.*, 617.

<sup>3</sup> *Counterfeiting.* The treaties differ very much as to what offenses of this nature are subjects of extradition; those which have been recognized as such may be stated as follows:

*Counterfeiting money.*

Treaty between the United States and

Venezuela, Aug. 27, 1860, Art. XXVIII., 13 *U. S. Stat. at L.*, 1158.

Hayti, Nov. 3, 1864, " XXXIX., 13 *Id.*, 728.

Convention between the United States and

The Dominican Republic, } Feb. 8, 1867, Art. XXVIII., 15 *U. S. Stat at L.*, (Tr.), 183.

*Making and uttering false money.*

Treaty between the United States and

The Two Sicilies, Oct. 1, 1855, Art. XXII., 11 *U. S. Stat. at L.*, 652.

*Fabrication or circulation of counterfeit money, whether coin or paper money.*

Treaty between the United States and

Austria, July 3, 1856, Art. I., 11 *U. S. Stat. at L.*, 692.

Bavaria, Sept. 12, 1853, " I., 10 *Id.*, (Tr.), 175.

Convention between the United States and

Prussia, June, 30, 1852, Art. I., 10 *U. S. Stat. at L.*, (Tr.), 100.

(Extended to the)

North German Confederation, } Feb. 22, 1868, " III., 15 *Id.*, (Tr.), 116.

Baden, Jan. 30, 1857, " I., 11 *Id.*, 714.

King of Sweden and Norway, } Mar. 21, 1860, " II., 12 *Id.*, 1126.

" Fabrication, introduction, emission de fausse-monnaie contrefaçon ou altération de papier-monnaie ou émission de papier-monnaie contrefait ou altéré; contrefaçon des poinçons servant à marquer les matières d'or et d'argent, contrefaçon des Sceaux de l'Etat et des timbres nationaux, alors même que la fabrication ou contrefaçon aurait en lieu dehors de l'Etat, qui réclame l'extradition."

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.

Austria, Nov. 13, 1855, 6 *Id.*, 579.

" Counterfeiting bank notes, public securities or money."

Treaty between Great Britain and

Prussia, Mar. 5, 1864, *Accounts and Papers*, 1864, vol. LXVI., (35.)

" Counterfeiting public bonds, bank notes and obligations, and, in general, any title and instrument of credit whatsoever; the counterfeiting seals, dies, stamps and marks of State and public administration, and the uttering thereof."

Convention between the United States and

Italy, March 23, 1868, Art. II., 15 *U. S. Stat at L.*, (Tr.), 130.

*Crime against nature.*

<sup>9</sup> *Embezzlement.* The treaties differ very much as to what offenses of this nature are subjects of extradition; they are variously stated as follows:

" *Embezzlement by clerks and servants.*"

Treaty between Great Britain and

Prussia, Mar. 5, 1864, *Accounts and Papers*, 1864, vol. LXVI., (35.)

*“ Embezzlement of public moneys.”*

Convention between the United States and  
 Prussia, June 16, 1852, Art. I., 10 *U. S. Stat. at L.*, (Tr.), 98.  
 (Extended to the) }  
 North German } Feb. 22, 1868, “ III., 15 *Id.*, (Tr.), 116.  
 Confederation, }  
 Baden, Jan. 30, 1857, “ I., 11 *Id.*, 714.

Treaty between the United States and  
 Austria, July 3, 1856, Art. I., 11 *U. S. Stat. at L.*, 692.  
 Bavaria, Sept. 12, 1853, “ I., 10 *Id.*, (Tr.), 175.  
 Mexico, Déc. 11, 1861, “ III., 12 *Id.*, 1200.

*“ Embezzlement by public officers, when the same is punishable with infamous punishment.”*

Convention between the United States and  
 The King of the French, Nov. 9, 1843, Art. II., 8 *U. S. Stat. at L.*, 532.

*“ Embezzlement by public officers including appropriation of public funds.”*

Convention between the United States and  
 The King of Sweden } Mar. 21, 1860, Art. II., 12 *U. S. Stat. at L.*, 1126.  
 and Norway, }

Treaty between the United States and  
 The Two Sicilies, Oct. 1, 1855, Art. XXII., 11 *U. S. Stat. at L.*, 652.

*“ Embezzlement by public officers or by persons hired or salaried, to the detriment of their employers.”*

Treaty between the United States and  
 Venezuela, Aug. 27, 1860, Art. XXVIII., 12 *U. S. Stat. at L.*, 1159.  
 Hayti, Nov. 3, 1864, “ XXXIX., 13 *Id.*, 728.

And the same was added to the treaty between the United States and  
 France by an additional article. 11 *U. S. Stat. at L.*, 741.

Convention between the United States and  
 The Swiss Con- } Nov. 25, 1850, Art. XIV., 11 *U. S. Stat. at L.*, 594.  
 federation, }  
 The Dominican } Feb. 8, 1867, “ XXXVIII., 15 *Id.*, (Tr.), 183.  
 Republic, }

*“ Embezzlement of public moneys, committed within the jurisdiction of either party, by public officers, or depositaries ; embezzlement by any person hired or salaried, to the detriment of their employers.”*

Convention between the United States and  
 Italy, Mar. 23, 1868, Art. II., 15 *U. S. Stat. at L.*, (Tr.), 130.

“ Soustractions et concussions commises par des depositaires (ou las-  
 siers) reverts d'un caractère public, des valeurs qu'ils aient entre les  
 mains a raison de leur fonctions ; soustractions commises par des cassiers  
 (ou depositaires) d'établissements publics, ou des maisons de commerce,  
 mais seulement dans le cas ou ces soustractions sont accompagnées des  
 circonstances qui leur donnent le caractère de crime.”

## Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

In an extradition treaty, the terms "public officers" or "public depositaries" do not comprehend officers of a railroad company, but only signify officers or depositaries of the government, in some of its branches or degrees. 8 *Opinions of U. S. Attorneys-General*, p. 106.

*False pretenses or false tokens.*

<sup>10</sup> *Forgery.*

## Treaty between Great Britain and

Prussia, Mar. 5, 1864, *Accounts and Papers*, 1864, vol. LXVI., (35.)  
Denmark, Apr. 15, 1862, " " 1862, vol. LXIII., (35.)

## Treaty between the United States and

Great Britain, Aug. 9, 1842, Art. X., 8 *U. S. Stat. at L.*, 576.  
Austria, July 3, 1856, " I., 11 *Id.*, 692.  
Bavaria, Sept. 12, 1853, " I., 10 *Id.*, (Tr.), 175.  
Venezuela, Aug. 27, 1860, " XXVIII., 12 *Id.*, 1159.  
Hayti, Nov. 3, 1864, " XXXIX., 13 *Id.*, 728.  
Hawaiian Islands, Dec. 20, 1849, " XIV., 9 *Id.*, (Tr.), 182.

## Convention between the United States and

The King of the } Nov. 9, 1843, Art. II., 8 *U. S. Stat. at L.*, 532.  
French, }  
Prussia, June 16, 1852, " I., 10 *Id.*, (Tr.), 100.  
(Extended to the) }  
North German } Feb. 22, 1868, " III., 15 *Id.*, (Tr.), 116.  
Confederation, }  
Baden, Jan. 30, 1857, " I., 11 *Id.*, 714.  
The Swiss Con- } Nov. 25, 1850, " XIV., 11 *Id.*, 594.  
federation, }  
The Dominican } Feb. 8, 1867, " XXVIII., 15 *Id.*, (Tr.), 183.  
Republic, }

In the treaty between the United States and Mexico, Dec. 11, 1861, (12 *U. S. Stat. at L.*, 1200, Art. III.,) there is added, "including the forging or marking, or knowingly passing or putting in circulation, counterfeit coin, or bank notes, or other paper current as money, with intent to defraud any person or persons." And the same provision was added to the treaty with France, Feb. 10, 1858, by an additional article. 11 *Id.*, 741.

In the treaty between the United States and The Two Sicilies, Oct. 1, 1855, (11 *U. S. Stat. at L.*, 652, Art. XXII.,) there is added, "including forging of evidence of public debt, bank bills, and bills of exchange."

In the convention between the United States and Italy, March 23, 1868, (15 *U. S. Stat. at L.*, (Tr.) 130, Art. II.,) forging is defined, for the purposes of the treaty, as "the utterance of forged papers, the counterfeiting of public, sovereign or government acts."

"The utterance or the emission of forged papers," is also specified by the following:



## Treaty between the United States and

Great Britain, Aug. 9, 1842, Art. X., 8 *U. S. Stat. at L.*, 576.Bavaria, Sept. 12, 1853, " I., 10 *Id.*, (Tr.), 175.Hayti, Nov. 3, 1864, " XXXIX., 13 *Id.*, 728.Hawaiian Islands, Dec. 20, 1849, " XIV., 9 *Id.*, (Tr.), 182.

## Convention between the United States and

Prussia, June 16, 1852, Art. I., 10 *U. S. Stat. at L.*, (Tr.), 100.

(Extended to the)	}	Feb. 22, 1868, " III., 15 <i>Id.</i> , (Tr.), 116.
North German		
Confederation,		

The Swiss Con-	}	Nov. 25, 1850, " XIV., 11 <i>Id.</i> , 594.
federation,		

"Faux en écriture publique ou authentique et de commerce, y compris la contrefaçon des effets publics de quelque nature qu'ils soient et de billets de Barque usage de ces faux litres. Sont exceptés les faux non accompagnés des circonstances qui leur donnent le caractère de crime."

## Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.Austria, Nov. 13, 1855, 6 *Id.*, 579.

It is forgery in France, within the provisions of the extradition treaty, for a royal notary to insert, in an authentic deed, false statements as matter of fact. Matter of Meitzger, 5 *New York Legal Observer*, 83.

Proof of the forging of checks on the Communal Chest of Breslaw, in Prussia, is sufficient cause for the issue of a warrant for judicial inquiry, with a view to the extradition of the criminal under the treaty between the United States and Prussia. 6 *Opinions of U. S. Attorneys-General*, p. 761.

By the law of the State of New York, "every person who, with intent to defraud, shall make any false entry, &c., in any book of accounts kept by any moneyed corporation in this State, &c., shall, upon conviction, be adjudged guilty of forgery in the third degree." *Held*, that a person offending against this statute was not guilty of forgery, within the meaning of the extradition treaty between the United States and Great Britain, nor of the act passed to give it effect, and could not therefore be surrendered on requisition. *Re Windsor*, *The Jurist*, vol. XI., 807.

<sup>11</sup> *Kidnapping*. "Defining the same to be, the taking and carrying away of free persons by force or deception."

## Treaty between the United States and

Mexico, Dec. 11, 1861, Art. III., 12 *U. S. Stat. at L.*, 1200.See, also, *False Imprisonment*, below.<sup>12</sup> *Larceny*.

## Treaty between Great Britain and

Prussia, Mar. 5, 1864, *Accounts and Papers*, 1864, vol. LXVI., (35.)

Larceny is not among the cases provided for by any convention between the United States and Great Britain, for the extradition of criminals. Neither is constructive larceny or embezzlement by private persons. 6 *Opinions of U. S. Attorneys-General*, pp. 85, 431.

Larceny of cattle, or other goods and chattels of the value of twenty-five dollars or more, when the same is committed within the frontier States or Territories of either nation.

Treaty between the United States and  
Mexico, Dec. 11, 1861, Art. III., 12 *U. S. Stat. at L.*, 1200.

*Grand larceny.* " Vol, lorsqu'il a été accompagné des circonstances qui lui donne le caractère de crime."

Convention between France and  
The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

*Maiming.* See *Mutilation*, below.

*Manslaughter.*

<sup>13</sup> *Murder.*

Treaty between the United States and  
Great Britain, Aug. 9, 1842, Art. X., 8 *U. S. Stat. at L.*, 576.  
Hawaiian Islands, Dec. 20, 1849, " XIV., 9 *Id.*, (*Tr.*) 182.  
Austria, July 3, 1856, " I., 11 *Id.*, 692.  
Bavaria, Sept. 12, 1853, " I., 10 *Id.*, (*Tr.*) 175.

Convention between the United States and  
Prussia, June 16, 1852, Art. I., 10 *U. S. Stat. at L.*, (*Tr.*) 100.  
(Extended to the)  
North German } Feb. 22, 1868, " III., 15 *Id.*, (*Tr.*) 116.  
Confederation, }  
Baden, Jan. 30, 1857, " I., 11 *Id.*, 714.

Under the British treaty it is held, that a person charged with murder on the high seas, on board a British vessel, must be given up when demanded by Great Britain. *Query?* Whether evidence of justification of the killing can be received in the proceedings. *Re Bennett*, 11 *Law Times Rep.*, 488. For murder on the high seas, on board a British vessel, is not committed within the jurisdiction of the United States, although the vessel comes into a port of the United States, but is committed within the exclusive jurisdiction of Great Britain.

" *Murder, comprehending the crimes designated (by the French penal Code) by the terms 'd'assassinat, de parricide, d'infanticide, et d'empoisonnement.'*"

Convention between the United States and  
The King of the } Nov. 9, 1843, Art. II., 8 *U. S. Stat. at L.*, 582.  
French, }  
Italy, Mar. 23, 1868, " II., 15 *Id.*, (*Tr.*) 130.  
The Swiss Con- } Nov. 25, 1850, " XIV., 11 *Id.*, 594.  
federation, }  
The King of Swe- } Mar. 21, 1860, " II., 12 *Id.*, 1126.  
den & Norway, }  
The Dominican } Feb. 8, 1867, " XXVIII., 15 *Id.*, (*Tr.*) 183.  
Republic, }

**Treaty between the United States and**

The Two Sicilies,	Oct. 1, 1855,	Art. XXII., 11	<i>U. S. Stat. at L.</i> , 652.
Mexico,	Dec. 11, 1861,	" III., 12	<i>Id.</i> , 1200.
Venezuela,	Aug. 27, 1860,	" XXVIII., 12	<i>Id.</i> , 1159.
Hayti,	Nov. 3, 1864,	" XXXIX., 13	<i>Id.</i> , 728.

**Treaty between Great Britain and**

Prussia,	Mar. 5, 1864,	<i>Accounts and Papers</i> , 1864, Vol. LXVI., (35.)
Denmark,	Apr. 15, 1862,	" " 1862, Vol. LXIII., (35.)

**To the same effect, see convention between France and**

The Grand Duchy of Saxe Weimar,	Aug. 7, 1858,	7 <i>De Clercq</i> , 444.
Austria	Nov. 13, 1855,	6 <i>Id.</i> , 579.

"*Attempt to commit murder*," is included in many of the preceding treaties.

"*Assault, with intent to commit murder*," is specified in others. See also, *Assault*, in this note, below.

<sup>14</sup> *Perjury*. Faux témoignage, lorsqu'il est accompagné de circonstances qui lui donnent le caractère de crime ; subornation de témoins.

**Convention between France and**

The Grand Duchy of Saxe Weimar,	Aug. 7, 1858,	7 <i>De Clercq</i> , 444.
Austria,	Nov. 13, 1855,	6 <i>Id.</i> , 579.

<sup>15</sup> ***Piracy*.****Treaty between the United States and**

Great Britain	Aug. 9, 1842,	Art. X., 8	<i>U. S. Stat. at L.</i> , 576.
Austria,	July 3, 1856,	" I., 11	<i>Id.</i> , 692.
Bavaria,	Sept. 12, 1853,	" I., 10	<i>Id.</i> , (Tr.), 175.
The Two Sicilies,	Oct. 1, 1855,	" XXII., 11	<i>Id.</i> , 652.
Mexico,	Dec. 11, 1861,	" III., 12	<i>Id.</i> , 1200.
Venezuela,	Aug. 27, 1860,	" XXVIII., 12	<i>Id.</i> , 1159.
Hayti,	Nov. 3, 1864,	" XXXIX., 13	<i>Id.</i> , 728.
Hawaiian Islands,	Dec. 20, 1849,	" XIV., 9	<i>Id.</i> , (Tr.), 182.

**Convention between the United States and**

Prussia,	June 16, 1852,	Art. I., 10	<i>U. S. Stat. at L.</i> , (Tr.), 100.
Extended to the) North German Confederation,	Feb. 22, 1868,	" III., 15	<i>Id.</i> , 116.
Italy,			
Baden,	Jan. 30, 1857,	" I., 11	<i>Id.</i> , 714.
The Swiss Con- federation,	Nov. 25, 1850,	" XIV., 11	<i>Id.</i> , 594.
The King of Swe- den & Norway,			
	Mar. 21, 1860,	" II., 12	<i>Id.</i> , 1126.

It was held by CROMPTON, BLACKBURN and SLEE, JJ., (dissentient COCKBURN, C. J.,) that piracy, in the treaty between the United States and Great Britain, August 9, 1842, (8 *U. S. Stat. at L.*, 576, Art. X.,) must not be understood in the sense of piracy, by the law of nations, but of acts made piracy by the municipal law of the United States. *Re Tivnan*, 5 *Best & Smith Q. B.*, 645.

*Lewis*, in his pamphlet on *Foreign Jurisdiction and the Extradition of Criminals*, (p. 39,) states his opinion as to the meaning of "piracy," in conformity with the decisions of the majority of the court in *Tivnan's Case*. Reporter's Note, in *Re Tivnan*, 5 *Best & Smith Q. B.*, 696.

In the time of peace, any act of depredation upon a ship is *prima facie* an act of piracy: but in time of war between two countries, the presumption is, that depredation by one of them on the ship of the other is an act of legitimate warfare. It is immaterial whether the act was done by soldiers or volunteers, and whether it was commanded by the belligerent State, or when done, ratified by it. *Re Tivnan*, 5 *Best & Smith Q. B.*, 645.

<sup>16</sup> *Rape.*

Treaty between the United States and

Mexico, Dec. 11, 1861, Art. III., 12 *U. S. Stat. at L.*, 1200.

Venezuela, Aug. 27, 1860, " XXVIII., 12 *Id.*, 1159.

Hayti, Nov. 3, 1864, " XXXIX., 13 *Id.*, 728.

Convention between the United States and

The King of the French, } Nov. 9, 1843, Art. II., 8 *U. S. Stat. at L.*, 582.

Italy, Mar. 23, 1868, " II., 15 *Id.*, (Tr.), 130.

The Swiss Confederation, } Nov. 25, 1850, " XIV., 11 *Id.*, 594.

The King of Sweden & Norway, } Mar. 21, 1860, " II., 12 *Id.*, 1126.

The Two Sicilies, Oct. 1, 1855, " XXII., 11 *Id.*, 652.

The Dominican Republic, } Feb. 8, 1867, " XXVIII., 15 *Id.*, (Tr.), 183.

"Viol; attentat à la pudeur consommé ou tenté avec violence; attentat à la pudeur consommé ou tenté même sans violence; sur une personne au sujet de laquelle, et en considération de son âge, un pareil attentat constituerait un crime."

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.

Austria, Nov. 13, 1855, 6 *Id.*, 579.

<sup>17</sup> *Robbery.*

Treaty between the United States and

Great Britain, Aug. 9, 1842, Art. X., 8 *U. S. Stat. at L.*, 576.

Austria, July 3, 1856, " I., 11 *Id.*, 692.

Bavaria, Sept. 12, 1853, " I., 10 *Id.*, (Tr.), 175.

Hayti, Nov. 3, 1864, " XXXIX., 13 *Id.*, 728.

Hawaiian Islands, Dec. 20, 1849, " XIV., 9 *Id.*, (Tr.), 182.

Convention between the United States and

The King of Sweden & Norway, } Mar. 21, 1860, Art. II., 12 *U. S. Stat. at L.*, 1126.

King of France, Feb. 24, 1845, " 8 *Id.*, 617.

Prussia, June 16, 1852, " I., 10 *Id.*, (Tr.), 100.

(Extended to the) }  
 North German } Feb. 22, 1868, Art. III., 15 *Id.*, (*Tr.*) 116.  
 Confederation, }

Baden, Jan. 30, 1857, " I., 11 *Id.*, 714.

Other treaties define or restrict the term as follows :

" *Robbery, with violence to the person robbed.*"

Treaty between Great Britain and

Prussia, Mar. 5, 1864, *Accounts & Papers*, 1864, vol. LXVI., (35.)

" Robbery, defining the same to be, the felonious and forcible taking from the person of another goods or money to any value, by violence or putting him in fear."

Convention between the United States and

Italy, Mar. 23, 1868, Art. II., 15 *U. S. Stat. at L.*, (*Tr.*) 130.

Treaty between the United States and

Mexico, Dec. 11, 1861, Art. III., 12 *U. S. Stat. at L.*, 1200.

" *Robbery, with violence, intimidation, or forcible entry of an inhabited house.*"

Treaty between the United States and

The Two Sicilies, Oct. 1, 1855, Art. XXII., 11 *U. S. Stat. at L.*, 652.

Convention between the United States and

The Swiss Con- }  
 federation, } Nov. 25, 1850, Art. XIV., 11 *U. S. Stat. at L.*, 594.

The Dominican }  
 Republic, } Feb. 8, 1867, " XXVIII., 15 *Id.*, (*Tr.*) 183.

The treaty between the United States and Venezuela, Aug. 27, 1860, (12 *U. S. Stat. at L.*, 1159, Art. XXVIII.), contains the same provision, except that it refers to private houses, and is not restricted to inhabited houses.

The treaty between the United States and the King of the French adds :

" And the corresponding crimes included under the French law, in the words '*vol qualifié*.'"

*Slave Trading.*

<sup>18</sup> *Law of Nations.* Offenses against any provision of this Code, the violation of which is declared to be a public offense, committed either within the jurisdiction of the nation making the demand, or against its rights, or the rights of its members. But see note 6, to Article 210, above.

The following list exhibits certain offenses which have also been made the subjects of extradition by several recent French and British treaties, and by American treaties ; and there are added certain crimes which, though perhaps not included in any treaty, still are worthy of consideration in framing a complete and efficient system.

*Abduction.* See *Kidnapping*, note 11, above ; and *False Imprisonment*, below.

*Accessories.* These provisions should perhaps be extended to the case of persons guilty in one country of being accessory before the fact to an

offense committed in another country, so as to enable the former nation to demand their extradition from the authorities of a third nation to which they may have fled.

In the case of Allsop, a British subject, having been charged in Great Britain with being an accessory before the fact to the murder of a Frenchman in Paris, and having escaped to the United States, the law officers of the Crown were of the opinion that the existing treaties did not sanction a demand upon the United States for his surrender to Great Britain, because he was not charged with the crime of murder committed within the jurisdiction of the British Crown. Op'n. of Sir J. D. Harding, Sir Fitzroy Kelly and Sir Hugh Cairns, *Forsyth's Cases and Opinions in Constitutional Law*, p. 368.

*Assault.* "Coups et blessures volontaires ayant occasioné soit la mort, soit une maladie ou incapacité de travail, pendant plus de vingt jours."

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

*Assault, with intent to kill.* See *Murder*, note 13, above.

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

*Boundaries. Injuries to national boundaries.*

*Conspiracy to commit a felony.* "Association de Malfaiteurs."

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 7 *Id.*, 579.

*Duelling.* It has been objected that this should not be a ground of a demand for extradition upon a nation whose laws do not make it an offense. *Transactions of National Association for the Promotion of Social Science*, 1866, p. 144.

*Extortion.* "Extorsion des titres et des signatures."

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

*False imprisonment.* "Sequestration ou arrestation, ou detention illegale des personnes."

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.  
Austria, Nov. 13, 1855, 6 *Id.*, 579.

*Forfeiture of recognizances in criminal cases.*

*Frauds by persons holding positions of trust.* Extradition cannot be demanded of France by the United States, in the case of a fraudulent breach of trust by private persons, notwithstanding that such offense is made grand larceny by the statutes of the State where committed.

The terms of the treaty, bearing on the subject, apply only to embez-

zement by public depositaries. 7 *Opinions of U. S. Attorneys-General*, p. 643.

*Fraudulent bankruptcies.*

Treaty between Great Britain and

Prussia, Mar. 5, 1864, *Accounts and Papers*, 1864, vol. LXVI., (35.)

Denmark, Apr. 15, 1862, " " 1862, vol. LXIII., (35.)

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.

Austria, Nov. 13, 1855, 6 *Id.*, 579.

*Fraudulent insolvencies.*

*Felonious homicide.* See *Murder*, note 13, above.

*Malicious injuries* to emigrants, international works, &c.

" *Mutilation.*"

Treaty between the United States and

Mexico, Dec. 11, 1861, Art. III., 12 *U. S. Stat. at L.*, 1200.

" *Castration.*"

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.

Austria, Nov. 13, 1855, 6 *Id.*, 579.

*Mutiny.* "Mutiny on board a ship, whenever a crew, or a part thereof, by fraud or violence against the commander, have taken possession of the vessel."

Convention between the United States and

Italy, Mar. 23, 1868, Art. II., 15 *U. S. Stat. at L.*, (Tr.) 130.

The King of Swe- } Mar. 21, 1860, " II., 12 *Id.*, 1126.  
den & Norway, }

*Seduction.*

*Smuggling.*

*Threatening.* "Menaces d'attentat contre les personnes ou les propriétés."

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.

Austria, Nov. 13, 1855, 6 *Id.*, 579.

*Exceptions.* The following treaties seem to make a general restriction of the enumerated crimes to cases where the crimes mentioned are subject to infamous punishment.

Convention between the United States and

Italy, Mar. 23, 1868, Art. II., 15 *U. S. Stat. at L.*, (Tr.) 130

The Swiss }  
Confed- } Nov. 25, 1850, " XIV., 11 *Id.*, 594.  
eration, }

The Domin- }  
ican Re- } Feb. 8, 1857, " XXVIII., 15 *Id.*, (Tr.) 183.  
public, }

Treaty between the United States and

Venezuela, Aug. 27, 1860, Art. XXVIII., 12 *U. S. Stat. at L.*, 1159.

Imprisonment for a term of years is infamous punishment, within this clause. 12 *Opinions of U. S. Attorneys-General*, 326.

*Exception of certain offenses.*

215. The provisions of this Section do not apply in any manner to cases in any of the following classes:

1. Crimes or offenses of a purely political character;<sup>1</sup>

2. Any offense committed in furthering civil war, insurrection or political commotion, which, if committed between belligerents, would not be a crime;<sup>2</sup>

3. Desertions from, or evasions of, military or naval service;<sup>3</sup>

4. Offenses committed before this Section took effect;<sup>4</sup> and,

5. Offenses which, by reason of the lapse of time, or any other cause, the demanding nation cannot lawfully punish.<sup>5</sup>

<sup>1</sup> This subdivision is suggested by Art. V. of the convention between the United States and France, 8 *U. S. Stat. at L.*, 582; and is usual in other treaties. *Bluntschli*, (*Droit Intern. Codifié*, § 396,) says, that this exception is recognized in all the recent treaties.

As to what are political offenses, see 7 *De Clercq*, 151.

The abuse of asylum is prohibited by Article 207.

<sup>2</sup> This subdivision is suggested in connection with, or as a substitute for, the preceding, in order to define and secure the right of *asylum*, as understood by the United States. Several French treaties contain a provision that an attempt against the person of a foreign sovereign, or against that of the members of his family, where the attempt constitutes the act either of murder "d'assassinat ou empoisonnement," shall not be considered as a political offense.

Additional convention of Sept. 22, 1866, to convention of Nov. 22, 1834, between France and Belgium, 7 *De Clercq*, 151.

Convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.

Great Britain has steadily refused to surrender political offenders, or to deny them asylum. Extradition of political offenders obtains between the States of the Germanic Confederation. But *Heffter* states this as an exception to the established principle. *Wheaton's Elem. Int. Law*, Pt. II., Ch. II., § 13, note.

<sup>3</sup> In no treaty do the United States include these, except so far as de-



serters from naval service may be reclaimed by the Consul. See Section II. of this Chapter, on EXTRADITION OF DESERTERS.

There are conventions between some European countries—*e. g.*, between Russia and Prussia, Aug. 8, 1857—for the mutual surrender of deserters, and persons owing future *military service*. *Dana's Wheaton*, § 120, note 79.

There are also conventions between European powers, for the restitution of arms, horses and equipments of deserters. See, for instance, 7 *De Clercq*, pp. 411, 412, 442, 496, 511.

<sup>4</sup> This exception is usual in the American treaties.

<sup>5</sup> Some of the French treaties have made the limitation laws of the nation where the offender is found, a bar to his extradition.

It may be thought desirable to add such a provision as the following :

No nation is bound to deliver up, under the provisions of this Section, a person who, according to the provisions of this Code, is a member of the same at the time the demand for his surrender is made. *Fiore*, (*Nouveau Droit International*, vol. 1, p. 329,) says, this is the generally received rule.

Such a provision is contained in the following treaties :

Convention between the United States and

The King of Swe- } Mar. 21, 1860, Art. IV., 12 *U. S. Stat. at L.*, 1126.  
den & Norway, }

Prussia, June 16, 1852, " III., 10 *Id.*, (*Tr.*) 101.

(Extended to the) }  
North German } Feb. 22, 1868, " III., 15 *Id.*, (*Tr.*) 116.  
Confederation, }

Baden, Jan. 30, 1857, " II., 11 *Id.*, 715.

Treaty between the United States and

Austria, July 3, 1856, Art. II., 11 *U. S. Stat. at L.*, 693.

Bavaria, Sept. 12, 1853, " III., 10 *Id.*, (*Tr.*) 176.

Mexico, Dec. 11, 1861, " VI., 12 *Id.*, 1202.

Hayti, Nov. 3, 1864, " XLI., 13 *Id.*, 728.

It is understood that the British extradition treaties all provide, that neither party shall surrender its own subjects. *Cases and Opinions in Constitutional Law*, by *Forsyth*, p. 371, note.

France is understood to hold the same rule. Letter of Mr. Lawrence, *Transactions of National Association for Promotion of Social Science*, 1866, p. 156.

And see the convention between France and

The Grand Duchy of Saxe Weimar, Aug. 7, 1858, 7 *De Clercq*, 444.

Austria, Nov. 13, 1855, 6 *Id.*, 579.

*Bluntschli*, (*Droit Intern. Codifié*, § 399,) states the exception of citizens as one now recognized even by the States which admit the obligation of extradition, but it has, as he says, grave inconvenience for the administration for criminal justice, and had better be abandoned.

*Dana*, (in his edition of *Wheaton*, § 120, note 77,) says, that the obligation or willingness of a State to surrender *its own citizens*, who are charged with crimes committed abroad, and have sought refuge in their own country, is affected by the consideration whether such State punishes its citizens for crimes so committed.

*Order of arrest.*

**216.** The executive authority of a nation upon which a requisition is made, accompanied by due proof of a foreign conviction or warrant of arrest, or other presumptive evidence that the case is one within the provisions of this Section, must direct the arrest of the accused for examination by the proper judicial authority.

A *mandat d'arret*, issued upon suitable evidence, by the proper judicial authority of France, and setting forth the crime imputed to the accused, is sufficient to justify the preliminary action of the President for the arrest of the alleged fugitive, leaving the ulterior question of his actual extradition to depend on the full evidence of criminality then, as it should appear from the dispatch of the Minister of Foreign Affairs, on its way from France. *Lawrence's Wheaton*, p. 242, note.

The President, in granting his order, at the request of a foreign government, for the purpose of commencing proceedings in extradition, does not need such evidence of the criminality of the party accused as would justify an order of extradition, but only *prima facie* evidence. 6 *Opinions of U. S. Attorneys-General*, p. 217.

The application for surrender, under the treaty of extradition of 1842, between the United States and Great Britain, may be made by the British Minister, and need not be founded on a previous indictment found against the prisoner, by the British tribunals, or on any warrant issuing therefrom. Matter of British Prisoners, 1 *Woodbury & Minot's U. S. Circuit Court Rep.*, 66.

A mere notification, by the *local officer* of a foreign government, of the escape of an alleged criminal, is not sufficient *prima facie* evidence of a case to justify the preliminary action of the President. 7 *Opinions of the U. S. Attorneys-General*, p. 6.

The United States will not make demand for extradition of a person alleged to be a fugitive from the justice of one of the United States, and to have taken refuge in a foreign country, except on the exhibition of a judicial "*warrant*," duly issued, on sufficient proof, by the local authority of the State in which the crime is alleged to have been committed. 6 *Opinions of U. S. Attorneys-General*, p. 485.

*Clarke*, in his *Treatise on Extradition*, (pp. 96, 98,) states the practice, under the treaties between Great Britain and France, as follows:

"Demands by Great Britain upon France are always made by the Ambassador in Paris, in the name of the English government, directly upon the French government, and are supported by a warrant of arrest, issued by a magistrate in England, and copies of the depositions upon which it was founded. These last, however, are not necessary, the French authorities being contented to deliver up the fugitive upon the production of the warrant of arrest only."

"The papers are always taken to France by a police officer able to speak to the identity of the accused. Upon this, the demand is considered by the French government; and if it is granted, the fugitive is arrested and given up, without any investigation by a French court. The matter is purely one of State, with which no legal tribunal is competent to deal."

"A demand in extradition upon England must be made upon one of the principal Secretaries of State, the Chief Secretary of the Lord-Lieutenant of Ireland, or the Governor of any foreign colony or possession of her Majesty, by the ambassador, or other diplomatic agent of the foreign government."

The demand need not be accompanied by any copies of depositions, or even a warrant of arrest issued in the foreign country; but it is usual for the Secretary of State to require some *prima facie* evidence of guilt to be laid before him. If, on consideration, he thinks the surrender should be granted, he issues his warrant, signifying that this requisition has been made, and requiring all magistrates to govern themselves accordingly, and to aid in apprehending the fugitive, and committing him to prison, to be delivered up pursuant to the treaty. The warrant is then taken before a magistrate, who, on the production of the foreign warrant of arrest, and also of some evidence that the accused has committed an offense within the treaty, issues his warrant of arrest.

The American practice is thus stated:

The mode to be pursued in proceedings for the extradition of criminals, is to prefer a complaint to a judge or other magistrate, setting out the offense charged to have been committed, on oath; whereupon, the judge or magistrate is authorized to issue a warrant for the apprehension of the person accused, and upon his being brought before him, to hear and determine the evidence of his criminality; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, to certify the same to the proper executive authority, that a warrant may issue for the surrender of the fugitive. 4 *Opinions of U. S. Attorneys-General*, p. 201.

To similar effect, see 9 *Id.*, p. 379.

But, if requested, the *President* will issue the previous authorization, thought to be necessary by a portion of the court, in *Re Kaine*, 14 *Howard's U. S. Sup. Ct. Rep.*, 103. 6 *Opinions of U. S. Attorneys-General*, p. 91.

In this respect, however, the extradition treaties of the United States seem to be of two classes. The treaty between the United States and Austria, July 3, 1856, (11 *U. S. Stat. at L.*, 692, Art. I.,) in its terms appears to contemplate an arrest *by judicial authority, in the first instance*, upon a complaint made under oath, and that the judicial decision, if against the accused, shall be certified to the executive authorities, in order that a warrant for surrender may issue.

And of the same character are the provisions in the treaty between the United States and

Great Britain, Aug. 9, 1842, Art. X., 8 *U. S. Stat. at L.*, 576.

Bavaria, Sept. 12, 1853, " I., 10 *Id.* (Tr.), 175.

Convention between the United States and

Prussia, June 16, 1852, Art. I., 10 *U. S. Stat. at L.*, (Tr.), 100.

(Extended to the)  
North German } Feb. 22, 1868, " III., 15 *Id.*, (Tr.), 116.  
Confederation,

Baden, Jan. 30, 1857, " I., 11 *Id.*, 714.

On the other hand, the later treaties—for example, the convention between the United States and Italy, March 23, 1868, (15 *U. S. Stat. at L.*, (Tr.), 131, Art. V.,) require a copy of the foreign warrant, or of the depositions upon which it was granted, to be *forwarded, in the first instance*, to the executive authority: the executive then to issue a warrant for the arrest of the accused, and his examination before the proper judicial authority.

The provisions presented in this draft embrace both methods.

In one case at least, it has been stipulated that the government of a nation might, before producing documentary evidence, demand the immediate and provisional arrest of the accused or convict; but compliance with the demand was left optional with the government on which the demand was made. When such provisional arrest was granted, the documentary evidence was required to be transmitted within two months, without which the person arrested was entitled to his discharge.

Convention between France and

The Grand Duchy }  
of Saxe Weimar, } Aug. 7, 1858, 7 *De Clercq*, 444, Art. IV.

This provision seems, however, too dangerous to be inserted in an international Code.

### *Arrest in anticipation of requisition.*

**217.** Upon presumptive evidence of an offense, within the provisions of this Section, the local tribunals, which would have cognizance of it, if committed within their jurisdiction, may arrest the person accused, and detain him for a reasonable time, to afford the foreign government opportunity to make requisition for his surrender. But the evidence must be sufficient to commit for trial, if the offense were committed within the local jurisdiction; and if no requisition be made within one month thereafter, the accused will be entitled to his discharge.

This is in substance the rule laid down by Chancellor KENT, on the review of continental and English authorities, in the Case of Washburn, 4 *Johnson's New York Chancery Rep.*, 106.

To the same effect are *Mure v. Kaye*, 4 *Taunton's Rep.*, 34; *Matter of British Prisoners*, 1 *Woodbury & Minot's U. S. Circuit Ct. Rep.*, 66.

These authorities, however, are opposed by others.

In the United States *v. Davis*, 2 *Sumner's U. S. Circ. Ct. Rep.*, 482, it is said, upon principles of international law, and independent of statute or treaty, that courts of justice are neither bound nor authorized to remand prisoners for trial to a foreign government whose laws they are said to have violated. See, also, 1 *Opinions of U. S. Attorneys-General*, p. 510; 2 *Id.*, p. 359.

And in the Matter of Henrich, 5 *Blatchford's U. S. Circuit Court Rep.*, 414; *Ex-parte Henrich*, 10 *Cox's Criminal Cases*, 626, it is said, that it should seem indispensable that a demand for the surrender of the fugitive should be first made upon the executive authorities of the government, and a mandate of the President obtained, before the judiciary is called upon to act. That at all events, this would be the better practice, and one in keeping with the dignity to be observed between nations in such delicate and important transactions.

That an executive order of surrender to a foreign government is purely a national act, is not open to controversy; nor can it be doubted that this executive act must be performed through the Secretary of State, by order of the President. But it does not follow that Congress is excluded from vesting authority in judicial magistrates to arrest and commit, preparatory to a surrender. *In re Kaine*, 14 *Howard's U. S. Sup. Ct. Rep.*, 103.

The original arrest may be made by the executive, or, *if the statute so provide*, it may also be made by the court or the examining magistrate. *Dana's Wheaton*, § 115, note 73.

In the Commonwealth *v. Deacon*, (10 *Sergeant & Rawle's Rep.*, 125,) it was held, that in the absence of an extradition treaty, no State magistrate, upon a charge by a private person, can cause a fugitive from a foreign country to be arrested for a crime committed in that foreign country, in order to afford an opportunity to the executive of the United States to deliver him up to the government of that country.

See, in this connection, the note to Article 216.

### *Preliminary investigation.*

**218.** Before making the surrender or arrest of an alleged fugitive from justice, the nation from which it is asked may determine for itself, upon a preliminary investigation, whether it is presumptively established that the person charged has committed the offense, as defined by this Code; or, in the case of a convict, that he has wrongfully escaped punishment.

It was held, in the Matter of Metzger, (5 *N. Y. Legal Observer*, 83; see, also, 1 *Barbour's New York Rep.*, 248, and 5 *Howard's U. S. Sup. Ct. Rep.* 176,) that the test of what constituted the crime is the law of the country which demands the fugitive, not that of the nation upon which the demand is made. In *Dana's Wheaton*, (§ 117, note 75, p. 186,) it is said, that the Extradition Acts are restricted to the cases which have the essential and substantial elements of the offenses specified, and according to

the law of *both* countries ; and the mere fact that an act which, according to the general law of either country, has not the character of a particular offense, is treated as such by the law of one of them, does not bring a case within the treaty. We must assume that the terms employed are used in a sense common to both parties to the treaty.

Compare *Re Windsor*, (6 *Best & Smith's Q. B. Rep.*, 522,) where it was held that the enumeration of crimes in the extradition treaty refers to such acts as amount to any of those offenses, according to the law of England and the general law of the United States, and does not comprise offenses which are only such by the local legislation of some particular State of the American Union ; and *Re Tivnan*, (5 *Best & Smith's Q. B. Rep.*, 696,) where piracy was taken as understood according to the law of the United States rather than the law of nations.

### *Rules for conducting investigation.*

**219.** The proceedings for the arrest of an alleged fugitive from justice, and the judicial investigation of the charge, must be conducted according to the rules established for similar preliminary proceedings, before the same courts or magistrates, in the case of a person charged with the commission of a like offense within the country.

*Clarke*, (*Extradition*, p. 99,) states the rules for the conduct of the investigation as follows, in the case of a demand in extradition upon Great Britain :

"The prisoner being apprehended and brought before a magistrate, three things are necessary: 1. The identity of the prisoner must be proved; 2. Such evidence of criminality must be given as, according to the laws of the place where he has been found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. Some evidence upon this point is necessary in the first instance, but the magistrate has the usual powers of remand, if it be not sufficient for commitment; 3. The magistrate must be satisfied, either upon the facts of the case or by the evidence of a foreign lawyer, that the offense charged comes within the definition of the crime contained in the treaty. This evidence must be taken in the prisoner's presence, in the usual way. The evidence of criminality, however, may consist, either wholly or in part, of copies of depositions taken by a judge or competent magistrate in the country claiming the fugitive."

"If, on examination, the magistrate finds that the acts are not disputed, but that a justification is established antecedent to, and independent of, the acts themselves, he must discharge the prisoner." *Id.*, 105.

In order to enable a justice of the peace to issue his warrant under the statute, 6 and 7 *Vict.*, c. 76, § 1, for the apprehension and committal for trial of an accused person, it need not appear that there was an original warrant for his apprehension in the United States, or depositions taken against him there ; and the warrant of such justice of the peace need not

allege that the evidence before him was taken under oath. *In re Tivnan*, 5 *Best & Smith's Q. B. Rep.*, 645.

A French warrant for the apprehension of an accused person is necessary in Great Britain in order to procure his extradition under 6 and 7 *Vict.*, c. 76 ; but it need not be signed by a judge or competent magistrate, and need only be authenticated as made in such manner as would justify the arrest of the accused person in France.

A person condemned *par contumace* in France continues to be an accused person, liable to be delivered over under the Extradition Acts. *In re Coppin*, 2 *Law Rep.*, (*Chancery Appeals*), 47.

In the United States it is held, that the application for an order of arrest must conform to the requirements of the domestic law. *Matter of Farez*, 7 *Abbott's Practice Reports, New Series*, (*New York*), 84. Also, that the question of remanding the prisoner for further examination, and the time of remanding, and the determination of the magistrate as to whether the crime is proved, and the case is within the treaty, are matters of purely judicial determination, not subject to appeal, nor to executive interference, or revision. *Matter of Metzger*, 5 *Howard's U. S. Sup. Ct. Rep.*, 176 ; 6 *Opinions of U. S. Attorneys-General*, p. 91 ; 10 *Id.*, 501.

The attorneys for the government in the United States are not charged with any duties in reference to the judicial inquiry instituted, before ordering an extradition. The minister or agent of the government making the requisition employs such counsel as he pleases, if any are necessary. 9 *Opinions of the U. S. Attorneys-General*, p. 246.

### *Documentary evidence.*

**220.** Evidence of the commission of a crime by the accused may consist, either wholly or in part, of original depositions, properly authenticated, conformably to the laws of the country where they were made, so as to entitle them to be received for similar purposes by the tribunals or magistrates of such country ; or, of exemplified copies, certified by the foreign court or magistrate, or proved, by oath, to be true copies of original depositions.

Such depositions or copies must be certified, as provided in Part VI. of this Code, entitled ADMINISTRATION OF JUSTICE, or by the minister of justice or chief executive officer of the demanding nation, or by the principal diplomatic or consular office of the nation upon which the demand is made, resident in such foreign country : to be legally authenticated according to the laws of the demanding nation, in the manner

which would entitle them to be received in evidence, for similar purposes, by its tribunals or magistrates.

Act of Congress of August 12, 1848, § 2, 9 *U. S. Stat. at L.*, 302; Act of Congress of June 22, 1860, § 1, 12 *U. S. Stat. at L.*, 84; 10 *Opinions of U. S. Attorneys-General*, p. 501; Matter of Metzger, 5 *New York Legal Observer*, 83; *In re Coppin*, 2 *Law Rep.*, (*Chancery Appeals*), 47; Correspondence of British and French Governments, *Accounts and Papers*, 1866, vol. LXXVI., (38.)

The complaint upon which the warrant of arrest is asked should set forth clearly, but briefly, the substance of the offense charged, so that the court can see that some one of the crimes enumerated in the treaty is alleged to have been committed. This complaint need not be drawn with the formal precision and nicety of an indictment for final trial, but should set forth the substance and material features of the offense. *In re Henrich*, 5 *Blatchford's U. S. Circuit Ct. Rep.*, 414; *Ex-parte Henrich*, 10 *Cox's Criminal Cases*, 626; 2 *Abbott's National Digest*, 509, note; Matter of Farez, 7 *Abbott's Pr. Rep. N. S.*, 84.

The affidavit which charges the crime is defective if the witness only swears to his belief. . . . Suspicion does not warrant a commitment, and all legal intendments are to avail the prisoner. The return is to be most strictly construed in favor of liberty. *Id.*

The court can regard only the facts set forth in the affidavit as having a legal existence. Any misrecitals and overstatements in the *requisition* and warrant, which are not supported by the affidavit, cannot be received as evidence to deprive a person of his liberty, and transport him to a foreign State for trial. *Ex-parte Smith*, 3 *McLean's U. S. Circuit Court Rep.*, 121.

The affidavit upon which a warrant of arrest is to issue for the extradition of a fugitive, must state distinctly that the fugitive has committed a crime, and that he committed it in the State from which the requisition comes; for no foreign State can entertain such a jurisdiction of crimes committed in another State as to entitle it to make requisition for the criminal on a third State. *Ex-parte Smith*, 3 *McLean's U. S. Circuit Court Rep.*, 121.

Each piece of documentary evidence offered by the agents of the foreign government in support of the charge of criminality, should be accompanied by a certificate of the principal diplomatic or consular officer of the United States resident in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge, by the tribunals of such foreign country. *In re Henrich*, 5 *Blatchford's U. S. Circuit Ct. Rep.*, 414; 2 *Abbott's Nat. Dig.*, 509, note; 10 *Cox's Criminal Cases*, 626.

The parties seeking the extradition of the fugitive should be required by the commission to furnish an accurate translation of every document offered in evidence which is in a foreign language, accompanied by an affi-



javit of the translator, made before him or some other United States commissioner or judge, that the same is correct. *Ib.*

Public officers should furnish authenticated copies of documents in their custody, when demanded, and should assist in bringing forward testimony, according to the duties of their several stations; and individuals should not refuse to give testimony. 1 *Opinions of U. S. Attorneys-General*, p. 82.

The commissioner before whom an alleged fugitive is brought for hearing should keep a record of all the oral evidence taken before him, taken in narrative form, and not by question and answer, together with the objections made to the admissibility of any portion of it, or to any part of the documentary evidence, briefly stating the grounds of such objections, but should exclude from the record the arguments and disputes of counsel. *In re Henrich*, 5 *Blatchford's U. S. Circ. Ct. Rep.*, 414; 2 *Abbott's Nat. Dig.*, 509, note; 10 *Cox's Criminal Cases*, 626.

As to the necessary authentication of depositions under the English statutes to carry into effect the extradition treaties with France, see *Re Coppin*, 2 *Law Rep.*, (*Chancery App.*) 47; and the Correspondence between the French and English Governments on this point, in *Accounts and Papers*, 1866, vol. LXXVI., (38.) See reviews of this controversy in a paper by Mr. Westlake, in *Transactions of National Association for Promotion of Social Science*, 1866, p. 144, and in a report by Mr. Picot, *Bulletin de la Société de Legis. Comp.*, Mai, 1869, p. 56.

### *Necessary proof of guilt.*

**221.** The extradition of an alleged fugitive from justice, under this Section, can be made only when the fact of his commission of the offense is so far established that the laws of the country making the extradition would justify apprehension and commitment for trial, if the crime had been there committed.

This provision is contained in nearly all the American treaties. Mere suspicion is no ground for a requisition of a fugitive from a foreign nation. The law of nations requires that evidence, clear and positive, shall be furnished. 1 *Opinions of U. S. Attorneys-General*, p. 509.

The proof should be in all cases not only competent, but full and satisfactory, that the offense has been committed by the fugitive in the foreign jurisdiction; sufficiently so to warrant a conviction, in the judgment of the magistrate, of the offense with which he is charged, if sitting upon the final trial and hearing of the case. No magistrate should order a surrender short of such proof. *Ex-parte Kaine*, 3 *Blatchford's U. S. Circ. Ct. Rep.*, 1.

A letter from the foreign minister resident here, asking for the preliminary process for extradition of an alleged fugitive criminal, accompanied by a warrant of arrest of the accused, purporting to be issued on due inquiry and evidence, by competent judicial authority in the foreign nation

and sufficiently authenticated by the minister's certificate, would not, if presented to an examining magistrate in the United States, be alone sufficient to authorize him to certify the criminality of the party charged, on which to found his actual extradition ; for such evidence would not justify his commitment by the local law where the examination takes place. 6 *Opinions of U. S. Attorneys-General*, p. 217.

To authorize the arrest and removal of a fugitive from justice to the State having jurisdiction of the crime, it must distinctly appear, from the affidavits before the magistrate upon which the requisition was based, that the supposed criminal committed the crime in the State from which the requisition proceeds. *Ex-parte Smith*, 3 *McLean's U. S. Circ. Ct. Rep.*, 121.

Whether a *defense* may be interposed is a question which has been raised, but it seems better that the extradition should be made on the accusation, properly supported, leaving the case to be tried abroad. See, however, Letter of Mr. Lawrence, in *Trans. of Nat. Asso. for Prom. Social Science*, 1866, p. 156.

### *Evidence in case of convicted criminals.*

**222.** In case sentence or judgment of guilt has been pronounced in the country making the requisition, surrender shall not be obligatory, except on presentation to the authorities of the nation on which the requisition is made, of the original sentence or judgment establishing the guilt of the accused, properly authenticated, or of an exemplified copy thereof, as prescribed in article 220.

This article is suggested by the provisions of the convention between the United States and

Italy,	Mar. 23, 1868, Art. V., 15 <i>U. S. Stat. at L.</i> , (Tr.), 131.
King of Sweden } and Norway, }	Mar. 21, 1860, " I., 12 <i>Id.</i> , 1126.

### *Inquiry as to real motive of demand.*

**223.** A nation upon which a demand for extradition is made, under this Section, may protect its right to give asylum, by looking behind the mere formal proofs presented in support of the demand, to see that it is not made for a purpose to which this Section does not apply ; and, if satisfied that such is the case, may refuse the demand.

*Dana's Wheaton*, § 115, note 73, p. 184.

*Clarke*, (*Extradition*, p. 110,) lays down this rule :

No surrender should be granted except on the declaration of the min-

ister of the foreign power that the fugitive is wanted for trial for the offense charged in the depositions used against him, and no other.

Mr. Rathbone suggests that security should be given that the prisoner should have a public trial within a certain reasonable time, and that notice be sent to the representative abroad of the country surrendering the prisoner, that he may satisfy himself that these provisions of the treaty are carried out. *Transactions of Nat. Asso. for Prom. Social Science*, 1866, p. 144.

### *Conflicting claims.*

**224.** In case two or more nations claim a person, upon a charge of violating a provision of this Code, the nation within which the offense was committed has the prior right, unless proceedings upon the charge have already been commenced by the other nation.

*Surrender of those under arrest for local offenses may be deferred.*

**225.** The surrender of a person claimed under this Section, who has been previously arrested for the commission of an offense against the laws of the country where he is found, or who has been there convicted of such an offense, may be deferred until he shall have been acquitted or punished therefor.

This provision is founded upon the convention between the United States and

Italy, Mar. 23, 1868, Art. IV., 15 *U. S. Stat. at L. (Tr.)* 130.

Prussia, June 16, 1852, " IV., 10 *Id.*, (*Tr.*) 101.

(Extended to the) }  
North German } Feb. 22, 1868, " III., 15 *Id.*, (*Tr.*) 116.  
Confederation, }

King of Sweden } Mar. 21, 1860, " VI., 12 *Id.*, 1126.  
and Norway, }

Treaty between the United States and

Bavaria, Sept. 12, 1853, Art. IV., 10 *U. S. Stat. at L.*, (*Tr.*) 176.

Convention between France and

The Grand Duchy } Aug. 7, 1858, Art. V., 7 *De Clereq*, 444.  
of Saxe Weimar, }

### *Surrender, notwithstanding civil arrest.*

**226.** If the person claimed is under arrest in the country where he is found, on account of civil obligations, his surrender may be made notwithstanding, but upon condition that the right of the person concerned,

to pursue his remedy before the competent tribunals, is preserved.

Convention between France and

The Grand Duchy }  
of Saxe Weimar, } Aug. 7, 1858, Art. V., 7 *De Clercq*, 444.

*Conditional extradition.*

**227.** A nation upon which a demand for extradition is made under this Section, may impose conditions in reference to the treatment of the person surrendered.

*Bluntschli, (Dr. Int. Cod.,) § 401.*

*Member of a third nation.*

**228.** If the person whose surrender is demanded be a member of a third nation, which is a party to this Code, the surrender may be deferred until his nation has been informed of the proceeding, and invited to state objections, if any, to the extradition.

In such event, if a case for extradition be established, the nation on which the demand is made may deliver the person accused either to his own nation or to that making the demand.

Convention between France and

The Grand Duchy }  
of Saxe Weimar, } Aug. 7, 1858, Art. VII., 7 *De Clercq*, 444.

As to the obligation of a nation to surrender its own members, see note 5 to Article 215.

*Surrender, by whom made.*

**229.** Except as provided in articles 230 and 231, a surrender is to be made only by authority of the proper executive officer of the nation upon which the demand is made.

This provision is usual in the American treaties. By the British and American systems of extradition, the *judicial* inquiry and determination of the fact of culpability is interposed as a condition to the surrender, but the judicial magistrate is not vested with power to make the surrender. *Dana's Wheaton*, § 115, note 73.

The question whether the *casus fœderis* has arisen, or whether the compact will be executed, is a political question, to be decided by the President, and the courts have no power to direct or contravene his decision. Matter of Metzger, 5 *New York Legal Observer*, 83.

*Surrender in case of offenses committed on the frontier.*

**230.** In the case of persons found in a frontier State or Territory of one nation, lying along the boundary between it and a contiguous nation, the surrender demanded by such contiguous nation, or its frontier State or Territory, may be made either as provided in the last article, or by the chief civil authority of the frontier State or Territory in which the person is found, or by such chief civil or judicial authority of the district or country bordering on that frontier, as may for this purpose be duly authorized by the civil authority of such frontier State or Territory ; or, when from any cause the civil authority of such State or Territory is suspended, by the chief military officer in command of such State or Territory.

See Article 212.

Treaty between the United States and

Mexico, Dec. 11, 1861, Art. II., 12 *U. S. Stat. at L.*, 1200.

*Surrender by colonial government.*

**231.** In the case of a person found within the territorial jurisdiction of a colonial government, the surrender may be made either as provided in article 229, or by the Governor or executive officer of the colony.

Such officer may either make the surrender demanded of him, or may refer the question to the government of the nation to which he belongs.

See Article 213, and note.

*Things in prisoner's possession.*

**232.** All articles in the possession of the prisoner at the time of his arrest, and taken with him, must be delivered up on making the surrender, including not only articles stolen, but all those which can serve as evidence of guilt.

Convention between France and

The Grand Duchy } Aug 7, 1858, Art. III., 7 *De Clercq*, 444.  
of Saxe Weimar, {

*Second arrest.*

**233.** The discharge of a person arrested under the provisions of this Section, does not preclude a second arrest under a new complaint relating to the same offense,<sup>1</sup> except where he is entitled to a discharge by reason of the lapse of time.

<sup>1</sup> 6 *Opinions of U. S. Attorneys-General*, p. 91 ; 10 *Id.*, 501.

*Custody of the prisoner.*

**234.** Any person duly appointed, by the nation demanding the extradition, as its agent to receive the surrender, is entitled to the same protection, in the execution of his duties, within the jurisdiction of the nation making the surrender, as is given by its laws to its own officers in the exercise of similar functions ; and the obstruction of such agent, or the rescue or attempted rescue of the person from his custody, is punishable in the local tribunals, in the same manner as in the case of obstruction to, or rescue from, the local officers.

This article is suggested by the statute for giving effect to the Act of Congress of the United States for the extradition of criminals, passed March 3, 1869, 15 *U. S. Stat. at L.*, 337.

*Discharge in case of delay of extradition.*

**235.** A person surrendered under this Section must be conveyed out of the country making the surrender, within two months after his commitment for extradition, and in default thereof, shall be discharged.

Act of Congress of the United States, August 12, 1848, 9 *U. S. Stat. at L.*, 303, § 4.

*Limitations of time extended in certain cases.*

**236.** The time necessary to allow the intervention of the nation to which a colony belongs, according to article 213, or of that to which a foreigner whose extradition is demanded belongs, according to article 228, is not to be computed as a part of any of the times limited by the provisions of this Section for the arrest or extradition of an alleged fugitive from justice.

*Restrictions as to punishment.*

**237.** No person surrendered under the provisions of

this Section shall be prosecuted or punished, in the nation to which he is surrendered, for any offense committed previous to that for which his surrender was demanded,<sup>1</sup> nor for any offense which was not mentioned in the demand,<sup>2</sup> or which is of the classes mentioned in article 215, committed before the extradition.<sup>3</sup>

<sup>1</sup> This provision is suggested by the convention between the United States and Italy, March 23, 1868, 15 *U. S. Stat. at L.*, (Tr.), 130, where, however, it is restricted to "*ordinary*" crimes.

<sup>2</sup> If, during the proceedings, a new crime is discovered, not mentioned in the demand, a new demand must be made founded thereon, in order to entitle the demanding nation to punish for the latter offense. *Fioré, Nouveau Droit International*, vol. 1, p. 329.

<sup>3</sup> According to the conventions between France and several other nations, (cited in *Clarke on Extradition*, p. 178,) a person whose extradition has been accorded can in no case be prosecuted or punished for any political crime or offense committed before the extradition.

*Necessary legislation to be provided.*

**238.** Each nation which requires a judicial investigation before surrendering in extradition, must provide by law the necessary judicial power to carry into effect the provisions of this Section.

In England, the requisition must always be made through the executive government; and in treaties of this description made by that nation, the preliminary action of the Legislature is necessary.

At the time of the signature of the treaty of 1842, between the United States and Great Britain, the British Minister stated that the rendition treaty could have no effect in the British dominions in Europe till Parliament acted upon it. In Canada, it could have immediate effect. *Lawrence's Wheaton*, p. 241, note.

The constitutional doctrine in Great Britain is, according to *Forsyth, (Cases and Opinions in Constitutional Law*, p. 369, note,) that the Crown may make treaties with foreign States for the extradition of criminals; but those treaties can only be carried into effect by act of Parliament; for the Executive has no power, without statutory authority, to seize an alien here and deliver him to a foreign power. *Hansard's Parliamentary Debates*, vol. LX., pp. 317-327.

And the law is the same in the United States. *Kent's Commentaries*, p. 284.

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## SECTION II.

## EXTRADITION OF DESERTERS.

The provisions of this Section are substantially the same as those found in nearly all the consular and commercial treaties. The treaties are so numerous, and the provisions in them so similar, that it seems unnecessary to refer to them in detail. See *United States Consular Regulations*, (1870,) ¶ 35, and Treaties in Appendix No. 1.

ARTICLE 239. Marine deserters only intended.

240. "Desertion" defined.

241. Local tribunals to order arrest of foreign deserters.

242. Application, how made.

243. Capture and imprisonment.

244. Deserters to be sent back.

245. Limit of imprisonment.

246. Delay of extradition for punishment of offense.

*Marine deserters only intended.*

**239.** This Section applies to the inmates, other than passengers, of ships, public or private, of any nation a party to this Code, but to no other persons.

Neither Great Britain nor the United States have ever recognized any obligation to surrender military deserters.

*"Desertion" defined.*

**240.** "Desertion" is the absenting one's self from a ship and her service, without leave or legal justification,<sup>1</sup> and against the obligation of the party, with an intent not to return thereto.

<sup>1</sup> A casual overstay of leave is not desertion; but to refuse to return, after an absence on leave, is equally a desertion as to quit the ship. *United States Consular Regulations*, (1868,) p. 317, § 623.

<sup>2</sup> Leaving the vessel on account of cruelty, bad provisions, or other legal justification, is not desertion. *Magee v. The Moss*, *Gilpin's U. S. District Court Reports*, 219; *Hanson v. Rowell*, 1 *Sprague's (U. S.) Admiralty Decisions*, 117; *Hart v. The Otis*, *Crabbe's U. S. Dist. Ct. Rep.*, 52; *Freeman v. Baker*, *Blatchford & Howland's Cases in Adm.*, 372.



*Local tribunals to order arrest of foreign deserters.*

**241.** The police courts or magistrates of each nation shall, upon the application mentioned in the next article, order the arrest and surrender to his consul of any person charged with desertion, as therein provided, unless it appears that the person charged was at the time of shipping, and still is,<sup>1</sup> a member of the nation in which his extradition is claimed.

For the purpose of making provision for the *discharge and relief* of seamen, all seamen regularly shipped in the ships of any nation are to be regarded as such nation's seamen.

<sup>1</sup> Most of the treaties only allow the exception in favor of citizens, when the party was such at the time of shipping; but obviously the same character must continue at the time of the application, to entitle the party to the exemption.

Article IX. of the convention between the United States and France, Feb. 23, 1853, (10 *U. S. Stat. at L.*, (*Tr.*,) 114,) contains an exception of somewhat the same effect, as follows: unless "citizens of the country where the demand is made, either at the time of their shipping or of *their arrival in the port.*"

*Application for extradition, how made.*

**242.** Application for the extradition of deserters must be made in writing by the consul<sup>1</sup> of the ship's nation, accompanied with proof, by the exhibition of the register of the ship, the roll of the crew, or by other official documents; or, if the ship be absent, by copies of such documents, duly certified, that the person charged belongs to the ship, and with proof, by oath, of his identity.<sup>2</sup>

<sup>1</sup> The application must be made by the consul, because in reference to the *discharge* with his own consent, of a seaman or mariner, being a citizen of the consul's nation, the consul acts as the lawfully authorized guardian of the seaman of his nation, to hear and examine his complaints, and to afford him the only protection which the representative of his country can give him on foreign soil, viz., the termination of his connection with the ship. *United States Consular Regulations*, (1870,) §§ 131, 133.

<sup>2</sup> The convention between the United States and Italy, Feb. 8, 1868, (15 *U. S. Stat. at L.*, 190, Art. XIII.,) and some others, allow surrender without oath to identity, but it should seem better to abrogate that exception.

*Capture and imprisonment.*

**243.** The local authorities must give all necessary aid in searching for and arresting the deserters, and, at the request and expense of the consul,<sup>1</sup> must imprison them until restored to their ships, sent home, or discharged.

By the provisions of this Code as to jurisdiction, the process of the local authorities may be executed on private and other unarmed foreign ships within the waters of a nation.

<sup>1</sup> Convention or treaty between the United States and

Belgium,	Dec. 5, 1868, Art. XII.,	<i>U. S. Cons. Reg.</i> , (1870,) ¶ 500.
France,	Feb. 23, 1853, “ IX.,	10 <i>U. S. Stat. at L.</i> , (Tr.), 114.
Italy,	Feb. 8, 1868, “ XIII.,	15 <i>Id.</i> , (Tr.), 185.
New Granada,	May 4, 1850, “ III.,	10 <i>Id.</i> , 900.

In many treaties of the United States, however, it is provided, that “deserters, when arrested, shall be at the disposal of their consuls,” and “may be confined in the public prisons, at the *request and expense of those who shall reclaim them*,”—meaning the agents, owners or masters of vessels on account of whom the deserters have been apprehended,—“until restored to their ships, or sent back to their own country.”

See treaty or convention between the United States and

Bolivia,	May 13, 1858, Art. XXXIV.,	12 <i>U. S. Stat. at L.</i> , 1003.
Denmark,	July 11, 1861, “ II,	13 <i>Id.</i> , 605.
Dominican Republic,	{ Feb. 8, 1867, “ XXVI.,	15 <i>Id.</i> , (Tr.), 183.
Prussia,	May 1, 1828, “ XI.,	8 <i>Id.</i> , 382.
Russia,	Dec. 6-18, 1832, “ IX.,	8 <i>Id.</i> , 448.
Sweden & Norway,	{ July 4, 1827, “ XIV.,	8 <i>Id.</i> , 346.

And other treaties. *United States Consular Regulations*, (1870,) ¶ 35, and Appendix No. 1.

It is noticeable that expenses of search and arrest are not provided for.

*Deserters to be sent back.*

**244.** The deserters may be restored by the consul to the ship to which they belong, if within his jurisdiction, or sent back to his country in ships of any nation whatsoever.

*Limit of imprisonment.*

**245.** Except as provided in the next article, the imprisonment of a deserter, under this Section, cannot continue more than two months,<sup>1</sup> reckoning from the day of his arrest; at the expiration of which time, and upon a notice of three days given to the consul, the

deserter must be set at liberty, and cannot be again arrested for the same cause.

<sup>1</sup> The time stated in the treaties as the limit of imprisonment, varies from two to six months.

Treaty between the United States and Sweden and Norway, July 4, 1827, Art. XIV., 8 *U. S. Stat. at L.*, 346, . . . two months.

Convention between the United States and France, Feb. 23, 1853, Art. IX., 10 *Id.*, (*Tr.*), 114, . . . three months.

Consular convention between France and Austria, Dec. 11, 1866, Art. XII., 9 *De Clercq*, p. 669, . . . three months.

Treaty between the United States and Russia, Dec. 6-18, 1832, 8 *U. S. Stat. at L.*, 448, . . . four months.

Treaty between the United States and Hawaii, Dec. 20, 1849, Art. X., 9 *Id.*, (*Tr.*), 182, . . . six months.

*Delay of extradition for punishment of offense.*

**246.** If a deserter is charged with committing an offense cognizable by the local authorities, they may defer his surrender until he is acquitted, or punished therefor.

Consular convention between France and

Portugal, July 11, 1866, Art. XIII., 9 *De Clercq*, 582.

Austria, Dec. 11, 1866, " XII., 9 *Id.*, 669.

Brazil, Dec. 10, 1860, " IX., 8 *Id.*, 153.

Treaty between the United States and

Denmark, July 11, 1861, Art. II., 13 *U. S. Stat. at L.*, 605.

Dominican Republic, } Feb. 8, 1867, " XXVI., 15 *Id.*, (*Tr.*), 183.

Netherlands, Jan. 22, 1855, " X., 10 *Id.*, 1150.

Prussia, May 1, 1828, " XI., 8 *Id.*, 382.

Russia, Dec. 6-18, 1832, " IX., 8 *Id.*, 448.

Sweden and Norway, } July 4, 1827, " XIV., 8 *Id.*, 346.

And other treaties.

## PART II.

### THE RELATIONS OF A NATION TO THE PERSONS AND PROPERTY OF THE MEMBERS OF OTHER NATIONS.

TITLE VI. NATIONAL CHARACTER.

VII. DOMICIL.

VIII. NATIONAL JURISDICTION.

IX. DUTIES OF A NATION TO FOREIGNERS.

X. DUTIES OF FOREIGNERS TO THE NATION.

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## TITLE VI.

### NATIONAL CHARACTER.

National character, as here treated, and as elsewhere mentioned in this Code, is that which is recognized during Peace. It may perhaps be regarded as coextensive with Allegiance, and to some extent to correspond with Jurisdiction. In questions arising out of War, national character, in the sense of belligerent or neutral, is said to be impressed on persons, according to domicile or other circumstances; but it should seem better to use the words in this Code in their strict sense. The hostile or neutral character, which may be acquired or lost by acts aiding the enemy, without respect to any element of national character, is the subject of provisions in the BOOK on WAR.

For a recent discussion on the subject of National Character of Persons, see the *Transactions of British Association for the Promotion of Social Science*, 1868, pp. 158, 179; *Revue de Droit International*, 1870, No. 1, p. 120.

The new English Law of Naturalization recognizes the principle of defeasible allegiance, &c., as expressed in Chapter XIX. See "The Naturalization Act, 1870," 33 *Vict.*, c. 14.

CHAPTER XIX. Of Persons.

XX. Of Shipping.

## CHAPTER XIX.

## NATIONAL CHARACTER OF PERSONS.

## SECTION I. General provisions.

II. Allegiance.

III. Expatriation.

IV. Naturalization.

## SECTION I.

## GENERAL PROVISIONS.

ARTICLE 247. "National character" defined.

248. Every person has one national character.

249. Effect of marriage.

250. Legitimate child of a member of the nation.

251. Legitimate child of a foreigner.

252. Illegitimate children.

253. Effect of recognition.

254. Mode of recognition.

255. Illegitimate child born abroad.

256. Parents of unknown national character.

257. Presumption of membership.

258. Change of national character.

259. Political privileges unaffected by marriage.

260. Effect of marriage and removal.

*"National character" defined.*

247. The national character of a person is derived from his connection with a nation, being one of its members, as explained in this Chapter.

*Every person has one national character.*

248. Every person has a national character.<sup>1</sup> No

person is a member of two nations at the same time ;<sup>2</sup> but any nation may extend to a member of another nation, with his consent,<sup>3</sup> the rights and duties of its own members, within its own jurisdiction,<sup>4</sup> in addition to his own national character.

<sup>1</sup> This article would change the existing rule on the subject, in that it recognizes a national character in every person whomsoever, and declares distinctly that no person can have two national characters ; but it permits each nation to extend any rights or privileges of its members to strangers, who are members of another nation, or to suspend the rights and privileges of its own members, as provided in this Code, or by its own constitution and laws.

The existing rule may be stated as follows :

A person who has ceased to be a member of a nation, without having acquired another national character, is nevertheless deemed to be a member of the nation to which he last belonged, except so far as his rights and duties within its territory, or in relation to such nation, are concerned.

Such persons are said to number many thousands in France. *Heffter*, (*Droit International*,) § 38, subd. I., note 2.

By the French law they have a French status, if domiciled there, (1 *Boileux*, p. 58,) even if domiciled without authority; (*Id.*, p. 63;) but their national character is uncertain. *Heffter*, above. *Valette*, (*sur Prud'hon*, t. 1, p. 200,) is of the opinion that if domiciled in France they are French. But this is denied by 1 *Boileux*, pp. 52, 62.

<sup>2</sup> "Double nationality, though tolerated in a large part of Europe, has been expressly proscribed by many Codes, as the person is required to choose, in such case, between his actual and his native domicil. *Zouch*, *De Jure Fec.* II., 2, 13, who denies the possibility of being the subject of more than one State, certainly goes too far; for it depends purely on the provisions of the laws of the States in question." *Heffter*, § 59, a.

"That any one should be a member of two nations at once, is inadmissible in principle." *Westlake's Private International Law*, p. 21, § 22

If double allegiance or national character were allowed, resulting either from birth or from operation of law, a minor should be permitted to choose a single allegiance within a reasonable time after attaining to full age, according to the law of his domicil. See *Ludlam v. Ludlam*, 26 *New York Rep.*, 356. Such a declaration of alienage is now allowed by the "Naturalization Act, 1870," 33 *Vict. c. 14*, § 4.

<sup>3</sup> The authorities are conflicting on this point :

"No State can impose the rights and duties of citizenship upon aliens who do not choose to take them." *Re Conway*, 17 *Wisconsin Rep.*, 529.

"The laws of the United States determine what persons shall be regarded as citizens, irrespective of such persons' pleasure. *Calais v.*

Marshfield, 30 *Maine Rep.*, 518. (See a qualification of this, in the same case, cited below.)

"The Court of Aix . . . holds, that Art. 4 of the Constitution of 1793 conferred the French character upon foreigners in certain cases fully and without any necessity on the part of the persons thus naturalized *ipso facto*, of manifesting their will or making any declaration of any sort, . . . and that the only question that could be raised was as to the force of a protest to the contrary, which the foreigner might have made for the purpose of preserving his nationality." *Félix, Droit International Privé*, 1, p. 96, note (a) by M. Demangeat.

"The statutes of Anne and Geo. II., . . . are peculiar in attaching the character of British subjects to the native-born citizens of other States, without the volition of the subject, and without requiring the condition of residence." *Ex-parte Dawson*, 3 *Bradford's (New York) Rep.*, 137.

Laws of this character frequently limit to the territory the privileges conferred. [*Décret*, Aug. 26, 1811, Tit. 1, Art. 3; (*Roger Collard Codes, Franc., App.*, p. 46.)]

Similar laws have been passed in most of the United States; (see *Lynch v. Clark*, 1 *Sandford's Ch. (New York) Rep.*, 663;) and in some of them alien inhabitants have the electoral franchise. (*Ib.*)

\* This limitation is also applied at present where expatriation is not permitted. "The original connection is preserved, but only in the interest of the nation of which the individual was a member at the outset, without excluding, as far as relates to his adopted country, the validity of his naturalization there." *Félix, Droit Intern. Privé*, I., p. 57, note 1; *Wilson v. Marryat*, 8 *Term Rep.*, 45.

Native-born subjects are protected as such within the territory of the nation of their birth, even though claimed by another nation as its subjects. *Ainslie v. Martin*, 9 *Massachusetts Rep.*, 454.

So it was held by KENT and his associates, that the law of Spain, which authorized a domiciled American citizen to acquire the Spanish character by taking an oath before a Spanish consul in New York, without coming within Spanish territory, could not confer upon him a right accorded only to aliens; *i. e.*, the right to be sued in the Federal and not in the State courts. *Fish v. Stoughton*, 2 *Johnson's Cases, (New York)*, 407.

"If, by the laws of the country of their birth, children of American citizens born in such country are subjects of its government, the legislation of the United States will not be construed so as to interfere with the allegiance which they owe to the country of their birth while they continue within its territory." *United States Consular Regulations*, (1870,) p. 40, ¶ 115.

"Although the government of one country may grant to persons owing allegiance to that of another, the rights and privileges of citizenship, it is not intended to intimate that the government making such grant would thereby, and without their consent or change of domicile, become entitled to their allegiance in respect to any of their political duties or relations." *Calais v. Marshfield*, 30 *Maine Rep.*, 520.

In *Inglis v. Trustees of Sailors' Snug Harbor*, 3 *Peters' Rep.*, (U. S.) 157, STORY, J., says : The nation " may give him the privileges of a subject, but it does not follow that it can compulsorily oblige him to renounce his former allegiance."

In *Marryat v. Wilson*, 1 *Bosanquet & Puller's Rep.*, 443, the court says : " Is there any general principle in the law of nations, (out of which this adoption of subject seems to have grown,) that *in the parent State* the adopted subject is incapable of enjoying the privileges which have been conceded by the parent State to the subjects of that State which has adopted him ? I know of no such disabling principle ;" which is evidently not in conflict with the above limitation.

By the British " Naturalization Act, 1870," (33 *Vict. c. 14*.) an alien may acquire all political and other rights, powers and privileges of a native-born subject, except within the limits of the State of which he was previously a subject.

### *Effect of marriage.*

**249.** Except as provided in article 260, marriage does not change the national character of the wife.

Shanks v. Dupont, 3 *Peters U. S. Rep.*, 242.

See Article 248 ; and 1 *Phillimore's International Law*, p. 350,

### *Legitimate child of a member of the nation.*

**250.** A legitimate child, wherever born, is a member of the nation of which its father at the time of its birth was a member ; or, if he was not then living, of the nation of which he was at the time of his death a member, except as provided in the next article.

<sup>1</sup> This is the law in most European States, *Westlake*, p. 16, § 16 ; *Felix*, I., p. 54 ; but not in England or in the United States. However, in *Ludlam v. Ludlam*, 26 *New York Rep.*, 371, the Court says : " Citizenship of the father is that of the child, so far as the laws of the country of which the father is a citizen are concerned." And it has been held in the United States, that the national character of the parent is of no importance, even in the case of a child born within the territory to a parent who is not, and has not taken any step towards becoming naturalized there, and who removes the child while an infant. *Lynch v. Clarke*, 1 *Sandford's Ch. (New York Rep.)*, 585.

But this decision seems not to be entirely approved ; *Munro v. Merchant*, 26 *Barbour's (New York Rep.)*, 400, 401 ; and probably would at the most be considered as authority only in regard to the right of succession to real property within that State.

### *Legitimate child of a foreigner.*

**251.** A legitimate child, born within the jurisdiction<sup>1</sup>



of a nation of which its father was not a member at the time of his death or of its birth, is a member of such nation, if its father was also born therein.<sup>2</sup>

<sup>1</sup> Shipping having the national character of a nation, is deemed a part of its territory, within the meaning of this Chapter. *Heffter*, § 78; *Vattel*, *Droit des Gens*, Bk. I., ch. 19, § 216. Thus, persons navigating an alien ship "are *ex prima facie* aliens." *Chalmers' Colonial Opinions*, p. 652, (Am. ed. of 1858.)

<sup>2</sup> Some such limitation is necessary in order to prevent the perpetuation of a race of aliens domiciled within the territory. The restriction here proposed is that adopted in France. *Felix*, *Dr. Intern. Privé*, I., p. 109, note; *Mourlon*, (4th ed.,) 99.

### *Illegitimate children.*

**252.** Except as provided in article 255, an illegitimate child is a member of the nation of which its mother is a member at the time of its birth.

See *Westlake*, *Private Int. Law*, § 18, pp. 18, 19.

### *Effect of recognition.*

**253.** An illegitimate child, recognized by its father, becomes a member of the nation of which he is then a member.<sup>1</sup> Such recognition has no retroactive effect.<sup>2</sup>

<sup>1</sup> *Felix*, I., p. 55.

The conflicting authorities are referred to by *Boileux*, I., pp. 50, 51; *Mourlon*, I., pp. 88, 89.

<sup>2</sup> See *Felix*, *Dr. Int. Privé*, I., p. 108.

### *Mode of recognition.*

**254.** The recognition mentioned in the last article must be made in the manner provided by the law of the nation to which the father then belongs, and at a time when, by the law of that nation, the child is still a minor.

The authorities are to the effect that "the status of a person can never be modified except in conformity with his personal law;" (i. e., that of his domicile.) *Damangeat's* note to *Felix*, *Dr. Int. Privé*, I., p. 98.

"It is the law of his birth-place which renders him capable of disposing of his person." *Felix*, I., p. 108, no. 41. "Majority belongs to personal status, and is, and can only be, governed by the law of the country to which the person belongs." *Mourlon*, I., p. 94.

The rule stated in the article, however, is in harmony with other proposed changes, referring to the law of the nation of which the father is, and the child is to become, a member, as the test.

*Illegitimate child born abroad.*

**255.** An illegitimate child, born within the jurisdiction of a nation of which its mother is not a member at the time of its birth, is a member of such nation, if its mother was also born therein.

See *Westlake, Private Int. Law*, § 18, pp. 18, 19.

*Parents of unknown national character.*

**256.** A child, the national character of neither of whose parents is known, is a member of the nation within whose jurisdiction it is born.<sup>1</sup> If its birth-place is also unknown, such child is a member of the nation within whose jurisdiction it is first found.<sup>2</sup>

<sup>1</sup> *Mourlon*, I., pp. 87-92.

<sup>2</sup> *Westlake*, p. 19; *Felix*, I., p. 55, note (1); See *Savigny*, 8, § 359, *ad fin.*

*Presumption of membership.*

**257.** A person actually within the jurisdiction of a nation, is presumed to be a member of such nation, until the contrary is shown.

"The law presumes that all persons who live among us are citizens of the United States, until the contrary appears by strict proof." *State v. Beackmo*, 6 *Blackford's (Indiana) Rep.*, 488.

So, where the only fact is that the defendant spoke slanderous words within the territory. *Lister v. Wright*, 2 *Hill's (New York) Rep.*, 320.

"I think it may be assumed as a principle, that the law of nations, without regarding the municipal regulations prescribed for his admission, views every man as a member of the society in which he is found. Residence is *prima facie* evidence of national character, susceptible, however, at all times, of explanation. If it be for a special purpose, and transient in its nature, it shall not destroy the original or prior national character. But if it be taken up *animo manendi*, with the intention of remaining, then it becomes a domicile, superadding to the original or prior character the rights and privileges as well as the disabilities and penalties of a citizen or subject of the country in which the residence is established." *Johnson v. Merchandise*, 2 *Paine's U. S. Circuit Ct. Rep.*, 624, 625.

"Another (rule) is, that a neutral or subject found residing in a foreign country is presumed to be there *animo manendi*; and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence." *The Venus*, 8 *Cranch's U. S. Sup. Ct. Rep.*, 279.

It does not seem necessary to include in these provisions the case of corporations, which are sometimes said to have the national character of

the nation by virtue of whose laws they exist. It is a familiar rule that a corporation can have no legal existence beyond the territorial limits of the sovereignty which creates it.

It exists by force of the law; and where that ceases to operate and is no longer obligatory, the corporation can have no existence. It cannot migrate to another sovereignty, and can only have transactions from its home, through its agents. *The Baltimore and Ohio Railroad Co. v. Glenn*, 28 *Maryland Rep.*, 287. See *The Bank of Augusta v. Earle*, 13 *Peters' U. S. Supreme Ct. Rep.*, 519, Opinion of TANEY, Ch. J.

It is held, that a corporation chartered by two States, with the same capacities and powers, and intended to accomplish the same objects, exercising the same powers, and fulfilling the same duties in both States, is a distinct and separate body in each State. *County of Alleghany v. Cleveland & Pittsburgh R. R. Co.*, 51 *Pennsylvania Rep.*, 228.

### *Change of national character.*

**258.** The national character of any person may be change by expatriation and naturalization.

There are some other apparent cases of a loss of national character; such, for instance, as the French rule, that a Frenchman accepting, without authority from his government, public functions confided to him by a foreign nation, loses the quality of Frenchman; *Code Napoleon*, Art. 17; but these should rather be regarded as a denial of the rights or privileges of national character. In respect of the obligations or subjection of the individual, the national character should be deemed to continue until another is acquired.

### *Political privileges unaffected by marriage.*

**259.** Marriage gives to the wife the privileges of the national character of her husband,<sup>1</sup> but does not deprive her of the privileges of that which she had before marriage,<sup>2</sup> except as prescribed by the next article.

<sup>1</sup> *Phillimore's Intern. Law*, p. 350.

<sup>2</sup> This should seem to be the proper rule. Marriage "may change her civil rights, but it does not affect her political rights or privileges." STORY, J., in *Shanks v. Dupont*, 3 *Peters' U. S. Sup. Ct. Rep.*, 246.

The marriage of a woman in her own country with a foreigner domiciled therein, should certainly not denationalize her. The objection of double allegiance does not preclude her enjoying the privileges. As to the effect of marriage on nationality, see *Annual Register*, 1868.

By the British "Naturalization Act, 1870," (33 *Vict.*, c. 14, § 10.) a married woman is to be deemed a subject of the State of which her husband is for the time being a subject.

### *Effect of marriage and removal.*

**260.** If before or after her marriage, the domicile of

a woman is permanently removed from the territory of the nation to which she previously belonged, she acquires by such marriage and removal the national character of her husband.

This provision covers two classes of cases : 1. Where a woman emigrates while unmarried, and marries abroad, or in her own country, if only visiting there ; 2. Where she marries at home, and afterwards emigrates. No difference is recognized between emigration to the husband's country and emigration to another. So long as she remains in her native land, here are evident reasons for allowing her to retain her original nationality. But if an Englishwoman marries a Frenchman, and they both emigrate to America, there is no reason for continuing to her the rights or duties of the English character.

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## SECTION II.

### ALLEGIANCE.

ARTICLE 261. "Allegiance" defined.

262. Extinguishment of allegiance.

263. Renewal of allegiance.

*"Allegiance" defined.*

**261.** Allegiance is the obligation of fidelity and obedience which a person owes to the nation of which he is a member, or to its sovereign.

*Extinguishment of allegiance.*

**262.** Allegiance is extinguished,

1. By expatriation, and a formal act of renunciation ;
2. By discharge therefrom by the nation or sovereign entitled thereto ;
3. By change of national character, in the case mentioned in article 260.

At present no formal act is required except by municipal law. "The fact of renunciation is to be established like other facts for which there is no prescribed form of proof, by any evidence which will convince the judgment." 9 *Opinions of U. S. Attorneys-General*, (Aug. 17, 1857,) pp. 63, 64.

It has been suggested that a legal sentence of banishment from the

jurisdiction of a nation, ought to dissolve the allegiance of the banished person thereto, for the period during which the sentence is actually carried into effect, because by banishment the sovereign withdraws his protection, and ought to give up the correlative allegiance.

But to the contrary, see 1 *Phillimore's Intern. Law*, 349.

Moreover, if the right of expatriation is recognized, as proposed in this Chapter, the exile can dissolve his allegiance by acquiring another nationality.

### *Renewal of allegiance.*

**263.** Allegiance is revived by the voluntary return of the person to the territorial limits of his former country, and there acquiring a domicile, before naturalization elsewhere.

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## SECTION III.

### EXPATRIATION.

#### ARTICLE 264. "Expatriation" defined.

265. Intent.

266. Expatriation a right.

267. Effect of expatriation.

#### *"Expatriation" defined.*

**264.** Expatriation is the act of abandoning the territory of the nation of which the person is a member, with intent to become naturalized elsewhere.

#### *Intent.*

**265.** The intent mentioned in the last article may be formed at the time of the abandonment or afterwards, and may be proved like any other similar fact.

#### *Expatriation a right.*

**266.** Subject to the laws defining civil incapacities depending upon age, mental condition, personal domestic relations, and public service, every member of a nation, however his national character may have been acquired, has the right of expatriation, which cannot be impaired or denied.

No person is punishable for the act of expatriation, "not even though at a later day he should have lost his adopted citizenship." Protocol Bavarian Treaty, May 26, 1868, II., 1, 15 *U. S. Statutes at Large*, (Tr.), 149.

The nation of which a person has become a member by naturalization, is bound to allow his subsequent naturalization elsewhere, and to retain him as one of its members until such subsequent naturalization. Protocol Bavarian Treaty, May 26, 1868, III., 2, 15 *U. S. Stat. at L.*, (Tr.), 149.

### *Effect of expatriation.*

**267.** Expatriation does not change the national character of the person until completed by naturalization, but meantime he is entitled to be protected by the country whose naturalization he is seeking.

By the treaties of the United States with Prussia and Bavaria, 1868, (15 *U. S. Stat. at L.*, 115, 147,) an exception is made to this rule in the case of a naturalized citizen returning to the nation of his origin. Those treaties in effect provide that where an emigrant who has been naturalized abroad returns to his native country with intent to remain there, his naturalization in his adopted country cannot prevent him from regaining his former citizenship. If he renews his residence in his original country without the intent to return to the former, he shall be held to have renounced his naturalization; and the intent of a naturalized citizen, who has renewed his residence in his original country, may be held to exist when the person naturalized in the one country resides more than two years in the other country.

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## SECTION IV.

### NATURALIZATION.

**ARTICLE 268.** "Naturalization" defined.

269. Naturalization not obligatory.

270. Effect of naturalization.

271. Absentees cannot be naturalized.

272. Liability to justice on return.

### *"Naturalization" defined.*

**268.** Naturalization is the act by which membership in one nation, however acquired, is renounced, and membership in another is assumed.<sup>1</sup>

Neither the acceptance by a foreigner of the rights and duties of a member of a nation, under article

248, nor the declaration of intention to acquire a new national character,<sup>2</sup> constitutes naturalization, within the meaning of this Section.

<sup>1</sup> This form of expression is used so as clearly to include a re-adoption of the native or other prior national character after naturalization elsewhere; sometimes styled "repatriation"; *e. g.*, by Lord STANLEY, *Annual Register*, (N. S.,) 1869, p. 133.

<sup>2</sup> Treaty between the United States and

Baden, July 19, 1868, Art. I., *U. S. Cons. Reg.*, (1870,) ¶ 718.

*Naturalization not obligatory.*

**269.** Each nation is to judge for itself whom it will receive into naturalization.

Protocol Bavarian Treaty, III., 2, 15 *U. S. Stat. at L.*, (Tr.,) 149.

By Article III. of the convention between the United States and Great Britain, May 13, 1870, (*U. S. Cons. Reg.*, (1870,) ¶ 738,) the re-admission to the character of a citizen of the United States of one who desires to renounce a naturalization in Great Britain is dependent "on such conditions as that government may think fit to impose."

*Effect of naturalization.*

**270.** A person naturalized according to the provisions of this Section, becomes immediately a member of the nation by which the naturalization is conferred, but he must, within a reasonable time thereafter, send a copy of the record of naturalization to a public minister or consul of the nation to which he previously belonged, resident in the territory of the nation which thus adopts him.<sup>1</sup> Till this is done, the nation or sovereign which he has left may reclaim him.

<sup>1</sup> This condition is new. It is proposed in order to prevent the practice of obtaining a naturalization, and subsequently attempting to enjoy the privileges of the previous national character. This fraud is stated to have greatly increased of late. *U. S. Consular Regulations*, (1870,) ¶ 110.

*Absentees cannot be naturalized.*

**271.** No person can be naturalized who is not at the time actually within the territorial limits of the nation by which he is naturalized.<sup>1</sup> But this article does not apply to a person whose last allegiance is extinguished pursuant to the second subdivision of article 262.

<sup>1</sup> "The Naturalization Act, 1870," (33 *Vict.*, c. 14,) § 6, makes the actual

presence of the party within the territory of the nation naturalizing him, an essential requisite.

See an analogous provision as to length of residence in the Protocol of Bavarian Treaty, May 26, 1868, I., 1, 15 *U. S. Statutes at Large*, (Tr.,) 149.

See, also, *Fish v. Stoughton*, 2 *Johnson's Cases*, (New York,) 407.

### *Liability to justice on return.*

**272.** A naturalized person, who voluntarily returns within the territorial limits of the nation of which he was a member before his naturalization, remains liable to trial and punishment for an act punishable by its laws, and committed before his expatriation. But this article does not apply to a case where, by the laws of such nation, the liability is extinguished by limitation or otherwise.

Treaties between the United States and Bavaria, and Prussia, above.

## CHAPTER XX.

### NATIONAL CHARACTER OF SHIPPING.

In Commercial treaties, by which some of the privileges of domestic vessels are granted by each party to those of the other contracting power, it has been found important to prescribe a definite rule as to what shall constitute or prove national character. The importance of such a definite rule, agreed to by all nations, is enhanced by a consideration of the other questions which turn on the National Character of Shipping; such as jurisdiction, civil and criminal, over persons and transactions on shipboard; see Articles 309, 210, 241 and 243; such also, as allegiance of persons born on shipboard; see Article 251; such, also, as the authority of consuls in reference to wrecks; see Chapter XXVII., entitled WRECKS.

As before explained, National Character is used in this Code, as in the commercial treaties, in its proper sense, with reference to Allegiance and Jurisdiction. The condition upon which *hostile* character depends, in the case of war, which is often called national character, without, however, necessarily implying anything more than a temporary identification with or service of the enemy, are proper subjects for the provisions of the Book on WAR.

*Ortolan*, (*Règles Int. et Dipl. de la Mer*, vol. 1, p. 166, &c.) classifies the conditions of nationality, in the commercial laws of all countries, under



four points: 1. Construction or Origin; 2. Ownership; 3. Master; and 4. Crew.

The tests prescribed by the commercial treaties are various. They may be sufficiently indicated as follows:

By some treaties the national character of its ships is determined by each nation for itself, and will be accordingly recognized by the other nations. Of this class are the following:

Treaty between the United States and

The Two Sicilies, }	Oct. 1, 1855, Art. IX., 11 <i>U. S. Stat. at L.</i> , 639.
Argentine Confed- eration, }	July 27, 1853, " VI., 10 <i>Id.</i> , (Tr.), 237.

Some earlier treaties limit the privileges of national vessels to those built within the nation's territories, or lawfully condemned as prizes, or adjudged forfeited for breach of municipal laws, and belonging wholly to citizens of the nation.

Several treaties prescribe that a vessel belonging exclusively to one or more citizens of one nation, and whose captain is also a citizen of the same, such having also complied with all the other requisites established by law to acquire a national character, though the construction and crew be foreign, shall be considered a vessel of such nation.

Of this class are the following treaties:

Treaty between the United States and

Venezuela,	Aug. 27, 1860, Art. VIII., 12 <i>U. S. Stat. at L.</i> , 1148.
Ecuador,	June 13, 1839, " V., 8 <i>Id.</i> , 534.
Peru,	July 26, 1851, " XI., 10 <i>Id.</i> , (Tr.), 23.
Bolivia,	May 13, 1858, " V., 12 <i>Id.</i> , 1003.
Dominican Republic,	Feb. 8, 1867, " VIII., 15 <i>Id.</i> , (Tr.), 167.

The treaty between France and Honduras, Feb. 22, 1856, Art. XIII., (7 *De Clercq*, 10,) and others, substantially similar, provide that vessels shall be considered as having the national character, which were constructed in the nation, or, having been captured by its forces from an enemy, have been adjudged lawful prizes, or which have been condemned by its tribunals for violation of law; provided, however, that the owners, the master, and three-quarters [half] the crew, be of that nationality. Every such vessel, however, to be furnished with a passport, &c.

The English Shipping Act gives the *privileges* of national character only to ships wholly owned by its citizens. See *Abbott on Shipping*, 50; *Regina v. Arnaud*, 9 *Queen's Bench Rep.*, 817.

In determining the foreign or domestic character of a ship, for the purpose of ascertaining whether it is judicially subject to a maritime lien, the American courts inquire for the residence of the owners, and the enrollment is only *prima facie* evidence of their residence. *Hill v. The Golden Gate*, 6 *American Law Register*, 273, 302.

Charterers having, by the terms of the charter party, exclusive control, are deemed owners within this rule. *Id.*

The following rules are framed upon the theory :

1. That every ship ought to be subject to some one jurisdiction, and that therefore the *responsibilities* of national character ought to be impressed upon every ship, without reference to its satisfying the conditions of registry laws.

2. That every nation may accord such advantages as it chooses, and therefore the immunities and privileges of national character ought to be extended only to such ships as do satisfy the conditions of the local law.

ARTICLE 273. Every ship has one national character.

274. Origin of national character.

275. Change of national character.

276. Registry.

277. Passport required.

278. Contents of passport.

279. Effect of ship's passport.

*Every ship has one national character.*

**273.** Every ship has a national character, and no ship has that of two nations at the same time. But any nation may allow to ships of other nations within its own territory any of the privileges of its domestic ships.

*Origin of national character.*

**274.** The national character of a ship is that of the nation within whose territory she was constructed, until changed as hereinafter provided.

*Change of national character.*

**275.** The national character of a ship, however acquired, may be changed :

1. By its ownership, or a majority in interest thereof, becoming vested in owners of a different national character ;

2. By being captured and adjudged lawful prize, as provided in Book Second of this Code, on WAR ;

3. By judicial forfeiture, pursuant to the laws of another nation, for a breach of the laws thereof, or of the provisions of this Code.

In any such case the national character acquired is that of a majority in interest of the new owners.

*Registry.*

**276.** Any nation may refuse the privileges of its own national character to any ship which has not a recorded title, according to its laws.

*Passport required.*

**277.** A nation may, in its discretion, give to any of its ships a passport, such as is mentioned in the next article.

Without such a passport, no private ship is entitled to receive from other nations, parties to this Code, or their members, the immunities and privileges of its national character.

Suggested by the treaty between the United States and The Two Sicilies, Oct. 1, 1855, Art. IX., 11 *U. S. Stat. at L.*, 639.

*Contents of passport.*

**278.** The passport of a ship must contain :

1. The name, vocation and residence of the owner, if but one, or of each of the several owners, if more than one, mentioning their number, and in what proportion they share in its ownership ;

2. The name, dimensions and burden of the ship, and such other particulars as may be necessary to identify it ; and,

3. A statement that the ship bears the national character of the nation issuing the passport, and is entitled to the immunities and privileges thereof.

The passport must be certified by the executive authority, competent, by the law of such nation, to give the passport.

“ To entitle the national character of a vessel to recognition, it must be furnished with a passport, [*passe-port, congé ou enregistré,*] and which, certified by the executive authority competent by the law of such nation to give it, shall state : First. The name, the vocation and the residence of the owner, stating that there is but one, or of the several owners, indicating their number, and in what proportion they share in its ownership. Second. The name, the dimensions, the burden, and all other peculiarities of the vessel which can serve to identify its nationality.”

Treaty of friendship, commence and navigation between France and Honduras, Feb. 22, 1856, Art. XIII., 7 *De Clercq*, 10.

Nicaragua, Apr. 11, 1859, " XIII., 7 *Id.*, 586.

To very similar effect are the following :

Treaty of navigation between France and

Sweden & Norway, Feb. 14, 1865, Art. III., 9 *De Clercq*, 172.

Treaty of commerce and navigation between France and

The Free Cities of Lubeck, Bremen & Hamburg,	}	Mar. 4, 1865, Art. V., 9 <i>De Clercq</i> , 187.

The Grand Duchy of Mecklenburg Schwe- rin — (Extended to the) Grand Duchy of Mecklenburg Stre- litz,	}	June 9, 1865, " V., 9 <i>Id.</i> , 295.

Portugal,	July 11, 1866, " XXI., 9 <i>Id.</i> , 558.
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Treaty of commerce between France and

The Pontifical States, July 19, 1867, Art. X., 9 *De Clercq*, 739.

Treaty of friendship, commerce and navigation between France and

The Hawaiian Islands, Oct. 29, 1857, Art. XIV., 7 *De Clercq*, 322.

This treaty also provides that in case of doubt as to the nationality of a vessel, or of the ownership, or of the master or crew, the consuls of the country for which the vessel is destined shall have the right to demand authentic proof before visaing the papers of the vessel. This is to be done without charge to the ship.

### *Effect of ship's passport.*

**279.** The passport of a ship, issued in conformity to the last article, shall be everywhere taken as conclusive evidence of its national character at the date of the passport, and as presumptive evidence of such character at any subsequent time; subject, however, to the local regulations for verification; and also subject, in the administration of justice in civil and criminal cases, to the rules of evidence applicable in courts of justice.<sup>1</sup>

<sup>1</sup> On an indictment under a law making criminal certain acts done on board a vessel owned in whole or in part by a citizen of the United States, ownership in fact must be proved. General reputation or an American registry is not even *prima facie* evidence of ownership. *United States v. Brune*, 2 *Wallace Jr.'s U. S. Circuit Court Rep.*, 264.

It is not necessary to produce documentary evidence in order to prove the national character of a vessel, on an indictment for piracy. The laws that prescribe what ships' papers shall be carried on board, have relation to financial, commercial or international objects, and are not decisive in a

prosecution for piracy. The character of the vessel is then a matter of fact to be established by general evidence. *United States v. Furlong*, 5 *Wheaton's U. S. Supreme Court Rep.*, 184.

To show a vessel to be American, so as to give jurisdiction to punish offenses committed on board of her, it is enough to show, in the first instance, that she sailed from and to an American port, and was apparently owned and controlled by citizens of the United States. It is not necessary to produce her register. *United States v. Peterson*, 1 *Woodbury & Minot's U. S. Circuit Ct. Rep.*, 305.

But a ship engaged in a whaling voyage, without having surrendered her register or taken out an enrollment and license, pursuant to the act of July 18, 1793, was *held* not to be an American ship, within the purview of the act of March 3, 1835, ch. 40, punishing any of the crew of an American ship for an endeavor to make a revolt. *United States v. Rogers*, 3 *Sumner's U. S. Circuit Court Rep.*, 342.

Compare a somewhat different provision as to the effect of passports of persons, in Article 323.

## TITLE VII.

## DOMICIL.

CHAPTER XXI. Domicil, original and secondary.

XXII. Change of domicil.

XXIII. Effect of change of domicil.

## CHAPTER XXI.

## DOMICIL, ORIGINAL AND SECONDARY.

ARTICLE 280. "Domicil" defined.

281. Kinds of domicil.

282. Original and secondary.

283. Derivative and voluntary.

284. Every person has one domicil.

285. Original domicil of legitimates.

286. Original domicil of illegitimates.

287. Child of unknown parentage.

288. Continuance of domicil.

289. Wife's secondary domicil.

290. Child's secondary domicil.

291. Ward's secondary domicil.

292. Domicil of insane persons, &amp;c.

*"Domicil" defined.*

**280.** The term "domicil," as used in this Code, means the seat<sup>1</sup> of permanent residence—the home.<sup>2</sup>

<sup>1</sup> *Ortolan*, (*Explication Historique de Inst. Justinien*, t. I., p. 402, 6 ed.,) rejects the definition of domicil as "the place where a person has his principal establishment," for the reason that domicil is not a place at all, in the sense of being a portion of space. He substitutes the following: "The seat, or home, (*le siège, la demeure*,) which a person is deemed in law to have always for the exercise of certain rights or the application of certain laws." *Boileux*, I., p. 212; *Puchta*, *Vorlesungen*, I., S. 99, § 45, (5th ed.,) 2 *Kent's Commentaries*, 540 note, (8th ed.,) support the definition above given. See, also, *Westlake's Private International Law*, p. 31, note a,

and p. 35, Rule 2. *Demante*, I., p. 197; *Duranton*, I., no. 351; *Bug sur Pothier*, I., p. 3; *Valette sur Prudhon*, I., p. 236, cited *Mourlon*, I., p. 188. The definition of Lord WESTBURY, *Bell v. Kennedy*, *House of Lords*, 6 *Session Cases*, 3 series, p. 78; "The relation which the law creates between an individual and a particular locality," if not open to the objection of *Ortolan*, as above, that it is too vague to be of use, is only a statement of domicile; *i. e.*, the *status* arising from it. Although it is true that "domicil is in law what residence is in fact," (*Ortolan*, p. 403,) yet "domicil is the legal conception of residence;" (*Westlake*, § 30;) and this legal conception is predetermined in particular cases, not in view of all the facts of these cases, but of some only, which are taken as controlling, because it is considered that they are, in the majority of instances, most likely to lead to a conclusion in harmony with the fact. But when such special facts are taken as controlling for any other reason than this likelihood, a purely arbitrary extension is given to the term domicile, which ought to be rejected, and the alternative taken of placing these cases in some other category. Thus the minor's domicile, after his parents' death, follows that of the guardian. This rule is founded upon its correspondence with the fact in the great majority of instances. Should it be considered as also established that the succession to such minor's property is not to be changed by the guardian's change of domicile, the rule itself should not be rejected, but this proposition should be inserted among the rules of law relating to succession. See *Westlake*, *Private Int. Law*, § 86.

<sup>2</sup> *Political Code, Reported for New York*, § 6.

### *Kinds of domicile.*

**281.** Domicil is either :

1. Original; or,
2. Secondary.

### *Original and secondary.*

**282.** The original domicile is that of the person at the time of his birth. All others<sup>1</sup> are secondary.

<sup>1</sup> At any other time, whether at the place of the original domicile, or elsewhere.

### *Derivative and voluntary.*

**283.** A secondary domicile is derivative, when dependent upon the domicile of another person. Otherwise it is voluntary.

### *Every person has one domicile.*

**284.** No person can be without a domicile,<sup>1</sup> or have at one time more than one domicile.<sup>2</sup> But one may have a residence, for a particular purpose, at a place other than his domicile.<sup>3</sup>

<sup>1</sup> *Political Code, Reported for New York*, § 7; *Boileux*, I., p. 214; *Westlake's Private Intern. Law*, pp. 33-38; *Story*, § 47.

<sup>2</sup> *Political Code, Reported for New York*, § 7; *Boileux*, I., pp. 214, 215; *Mourlon*, I., p. 198; *Westlake*, §§ 316, 325; *McLaren's Law of Wills and Succession*, § 7, p. 4; *Brent v. Armfield*, 4 *Cranch's U. S. Circuit Ct. Rep.*, 579; *Crawford v. Wilson*, 4 *Barbour's (New York) Rep.*, 504.

The case of a person whose birth-place is unknown, buying two country houses in different countries under the same circumstances, and dying in one of them, (suggested in 4 *Phill. Intern. Law*, § 59,) is provided for by Articles 287 and 288.

<sup>3</sup> *Chaine v. Wilson*, 1 *Bosworth's (New York) Rep.*, 673; *Frost v. Brisbin*, 19 *Wendell's (New York) Rep.*, 11; *Douglas v. Mayor of New York*, 2 *Duer's (New York) Rep.*, 110; 4 *Phillimore's Intern. Law*, § 55.

### *Original domicil of legitimates.*

**285.** The original domicil of a child which is legitimate, or has been acknowledged by its father before its birth, is determined by the domicil of its father at the time of its birth; or, if its father is then dead, or has no voluntary domicil, by the domicil of its mother.

See *Ludlam v. Ludlam*, 26 *New York Rep.*, 356, 371; *Westlake's Private Intern. Law*, § 35; *Brown v. Lynch*, 2 *Bradford's Surrogate (New York) Rep.*, 214.

### *Original domicil of legitimates.*

**286.** The original domicil of an illegitimate child is determined by the domicil of its mother at the time of its birth, unless previously acknowledged by its father.

### *Child of unknown parentage.*

**287.** The original domicil of a child whose parents are unknown, is the place of its birth, or where it is first found.

### *Continuance of domicil.*

**288.** The existing domicil<sup>1</sup> continues until another is gained,<sup>2</sup> or until the death of the person, whichever first occurs, except as provided in article 301.<sup>3</sup>

<sup>1</sup> This is true not only as to the original domicil, but also in reference to the derivative domicil; *e. g.*, of the wife; (*Pennsylvania v. Ravenel*, 21 *Howard's U. S. Sup. Ct. Rep.*, 103; *Westlake*, § 42;) or minor; *Doe v. Lith-erberry*, 4 *McLean's Rep.*, 454; *Goods of Patten*, 6 *Jurist, N. S.*, 151; *Boileux*, I., p. 121.



<sup>2</sup> A domicil cannot be lost until another is gained. *Somerville v. Somerville*, 5 *Vesey's Ch. Rep.*, 787; *Graham v. Public Adm'r*, 4 *Bradford's Surrogate (New York) Rep.*, 127.

<sup>3</sup> The exception refers to the abandonment of a secondary domicil, with intent to acquire the original domicil.

*Wife's secondary domicil.*

**289,** The domicil of the wife follows the domicil of her husband, except:

1. When she is living apart from him,<sup>1</sup> separated by the decree of a competent tribunal,<sup>2</sup> or by his consent, such separation being allowed<sup>3</sup> by the domicil of each;<sup>4</sup>

2. When he has committed an offense which, by the law of her actual residence, entitles her to a divorce,<sup>5</sup> which she claims;<sup>6</sup>

3. When she or some other person is the committee of his person;<sup>7</sup>

4. When some person other than her husband is the committee of her person.<sup>8</sup>

*Bremer v. Freeman*, 1 *Deane's Rep.*, 212; *Political Code Reported for New York*, § 7.

<sup>1</sup> *Pothier, Contr. de Marriage*, § 524; 4 *Phillimore, Intern. Law*, §§ 71-73.

<sup>2</sup> *Vescher v. Vescher*, 12 *Barbour's (New York) Rep.*, 640; *Barber v. Barber*, 21 *Howard's U. S. Supreme Ct. Rep.*, 582; *Williams v. Dormer*, 2 *Rob.*, 505; 2 *Bishop on Marriage and Divorce*, (2d ed.,) § 125; (1st ed.,) § 728; *Pothier, ubi supra*, § 522; *Allison v. Catley, Session Cases*, 2nd series, I., 1025, 15th June, 1829; *McLaren's Law of Wills and Succession*, p. 15, § 29; *Boileux, I.*, pp. 222, 223, note 1; *Westlake, Private Int. Law*, § 42; contra, *Merlin, Répertoire de Jurisprudence, Domicile*, § 5, no. 1; *Dalloz, Domicil*, no. 9; *Zacharie*, p. 280, § 140. Doubted by Lord KINGSDOWN, in *Dolphin v. Robins*, 7 *House of Lords Cases*, 420; 3 *Macqueen's Rep.*, 581; *Re Daly's Settlement*, 22 *Jurist*, 525. It has even been held that a decree of separation cannot impose any particular domicil upon her. *Dijon*, 28 Ap., 1807; 6 *Dalloz*, t. 6, p. 379.

<sup>3</sup> This is indispensable. *Mourlon, I.*, p. 194, (4th ed.); *Bishop*, (2nd ed.,) 1, § 634; 2, § 129; 1 *McLaren's Law of Wills and Succession*, p. 15, § 29; *Dolphin v. Robins*, 3 *Macqueen's Rep.*, 563-584.

<sup>4</sup> *Westlake*, § 363. See *Connelly v. Connelly*, 7 *Moore's Privy Council Rep.*, 438, 471.

<sup>5</sup> *Bishop*, as above, 2, § 128, (2nd ed.,) § 730, (1st ed.,) *Westlake*, §§ 42, 364.

Whether the exception extends as far as to allow the wife to establish a domicil in a different judicial locality from that in which her husband's

domicil was situated at the time of the offense, has been denied. *Westlake*, § 365; 2 *Bishop*, (2nd ed.), § 128, (1st ed.), § 730.

Most of the State courts of the United States hold that it does. *Bishop*, 2, § 128; *Jenness v. Jenness*, 24 *Indiana Rep.*, 358, 359; *Reel v. Elder*, 62 *Pennsylvania Rep.*, 315; and the Supreme Court of the United States has followed their decisions in a late case, *Cheever v. Wilson*, 9 *Wallace's U. S. Sup. Ct. Rep.*, 108.

<sup>b</sup> *Bishop*, 2, § 129, (2d ed.) This restriction is put on the ground that the offense cannot be inquired into collaterally. *Dolphin v. Robins*, 3, *Macqueen's Rep.*, 578, 579; 7 *House of Lords Cases*, 418; *Bishop*, *ubi supra*.

If the restriction is admitted, it should not be extended to a case where the wife has removed, acquired a new home, commenced her proceedings for a divorce, and died before decree.

<sup>c</sup> *Armstrong v. Armstrong*, 7 *Veazey's (Vermont) Rep.*, 350.

<sup>d</sup> *Boileux*, I., p. 221; *Mourlon*, I., p. 195; *Demanté*, I., p. 206.

### *Child's secondary domicil.*

290. The domicil<sup>1</sup> of the father, and after his death, that of the mother while she remains unmarried, is the secondary domicil of the unemancipated<sup>2</sup> minor child, if legitimate, or acknowledged by the father, except,

1. While another person than the parent is the guardian of the child;<sup>3</sup>

2. While the parent has a committee of his person;

3. While the child has a voluntary domicil in a different place, pursuant to the provisions of article 303.

<sup>1</sup> Mere residence—*e. g.*, imposed by banishment—is not such a domicil. *Hardy v. De Leon*, 5 *Texas Rep.*, 237. Nor is the short forensic domicil, which is sufficient for purposes of divorce. See *Ringer v. Ringer*, 15 January, 1840, *Session Cases*, 2nd series, vol. 2, p. 307; *Brodie v. Brodie*, 30 *L. J.*, (*Prob. & Matr.*) 185.

The American cases, except in Louisiana, concur in holding that the mother loses all right to change her child's domicil on re-marriage, and that the step-father neither acquires it, nor imposes his domicil on the child, although the child actually resides with them. *Allen v. Thompson* 11 *Humphrey's Rep.*, 538; *Mears v. Sinclair*, 1 *West Virginia Rep.*, 195. (Where the mother was also guardian.) *Brown v. Lynch*, 2 *Bradford's (New York) Rep.*, 218.

To the same effect, *McLaren's Law of Wills and Succession*, § 13; *Pothier, Cout. d'Orleans, Intro.*, 17.

The rule in Louisiana is different. Succession of Lewis, 10 *Louisiana Annual Rep.*, 790.

It seems not to have been decided whether the death of the step-father would revive the mother's right in this respect.

<sup>2</sup> *Code Napoleon*, Liv. I., Tit. III., Art. 108; *Boileux*, I., p. 221; *Mourlon*, I., p. 195; *Political Code, Reported for New York*, § 7.

<sup>3</sup> *Mourlon*, I., p. 195.

<sup>4</sup> This exception is necessary, if the provisions of the article referred to are adopted, as, if the term "minor child" is not restricted to children under the age of pupillarity, such child might have actually changed its domicile.

### *Ward's secondary domicile.*

**291.** The domicile of the guardian, or if there are several jointly appointed, that of the one first named in the instrument of appointment, is the secondary domicile of his ward.

The case of an infant under two guardians having different domicils, does not seem to have yet arisen, in such a form as to require a decision. See *Robertson on Succession*, p. 201, note; *Pottinger v. Wightman*, 3 *Merrivale's Rep.*, 67.

### *Domicil of insane persons, &c.*

**292.** The domicile of a person of unsound mind, or of one duly declared incompetent, is determined by that of the committee of his person; or if there are several jointly appointed, of the one first named in the instrument of appointment.

*Phillimore's Law of Domicil*, p. 55; *Boileux*, I., p. 220; *Demanté*, I., p. 206; *Mourlon*, I., p. 195. See *Sharpe v. Crispin*, 38 *Law Journal, Probate*, 17; 1 *Law Rep., Prob. & Div.*, 611.

To the contrary, *Westlake Private Intern. Law*, § 52.

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## CHAPTER XXII.

### CHANGE OF DOMICIL.

**ARTICLE 293.** Right to change domicile.

294. Change of an adult's derivative domicile.

295. Guardian may change ward's domicile.

296. Parent's consent to change necessary.

297. Testamentary change of derivative domicile.

298. Change of domicile, how made.

299. Intention to change.

300. Presumption of no intention to change.

301. Reverting to original domicile.

302. Official or compulsory change of residence.

303. What law determines change of domicile.

304. Nationality not affected.

*Right to change domicil.*

**293.** Any person of full age and capacity, acting in good faith,<sup>1</sup> may at his pleasure change his voluntary domicil to any place where he has a right to reside.

<sup>1</sup> *Watson v. Simpson*, 13 *Louisiana Annual Rep.*, 337.

*Change of an adult's derivative domicil.*

**294.** The derivative domicil of an adult changes with a change of the voluntary domicil on which it depends.

*Guardian may change ward's domicil.*

**295.** The domicil of an unemancipated minor having no competent parent living, may be changed by its guardian,<sup>1</sup> with a change of his own domicil,<sup>2</sup> when acting in good faith and for its benefit.<sup>3</sup>

<sup>1</sup> 2 *Kent's Commentaries*, 227, note; *Wood v. Wood*, 5 *Paige's (New York) Rep.*, 605; *Holyoke v. Haskins*, 5 *Pickering's (Massachusetts) Rep.*, 20; *Succession of Lewis*, 10 *Louisiana Annual Rep.*, pp. 789, 790; *Carlisle v. Tuttle*, 30 *Alabama Rep.*, 613; *Townsend v. Kendall*, 4 *Minnesota Rep.*, 412. Doubted, *Ex-parte Bartlett*, 4 *Bradford's (New York) Rep.*, pp. 224, 225. Denied, *School Directors v. James*, 2 *Watts & Sergeant's Rep.* 568; *Mears v. Sinclair*, 1 *West Virginia Rep.*, 185.

<sup>2</sup> *Kent's Com.*, 227, note; *Lyon v. Andrews*, 12 *Louisiana Annual Rep.*, 685; *Felix, Droit Intern. Privé*, I., p. 57, note; *Mourlon*, I., p. 191, II.; *Duranton*, I., no. 367, p. 301.

<sup>3</sup> *Pottinger v. Wightman*, 3 *Merivale's Rep.*, 67.

*Parent's consent to change necessary.*

**296.** The guardian can not change the domicil of his ward while the latter has a competent parent living, except with the consent of such parent.

*Political Code, Reported for New York*, § 7.

*Testamentary change of derivative domicil.*

**297.** A person authorized so to do by the law of his domicil, may change the domicil of any person dependent on his, after his death, to any place where the survivor has a right to reside.

In *White v. Howard*, 52 *Barbour's (New York) Rep.*, 294, it was held that a widower domiciled in Connecticut might change the domicil of his unemancipated minor child, upon his death, by appointing a testamentary guardian domiciled in New York.

*Change of domicile, how made.*

**298.** A change of domicile is produced by the act of residing in another country,<sup>1</sup> with the intention of making that country the home.<sup>2</sup> There must be a union of act and intent.

<sup>1</sup> If the intent exists, a residence in pursuance of that intention, however short, is sufficient. *Bell v. Kennedy*, *L. R.*, 1 *Scotch App.*, 319; *Westlake's Private International Law*, § 39; 4 *Phillimore's Int. Law*, p. 155, note; *Merlin, Répertoire de Jurisprudence*, vol. 8, p. 337, (5th ed.) It has been supposed that a domicile of succession might be acquired without any fixed place of residence in the new country, if the previous domicile has been unequivocally abandoned. *Westlake*, § 34; *Somerville v. Somerville*, 5 *Vesey, Jr.'s Rep.*, 791; *Bradley v. Lowrey*, 1 *Spear's Equity Rep.*, (*U. S.*) 16.

<sup>2</sup> *Chaine v. Wilson*, 1 *Bosworth's (New York) Rep.*, 673; *Munro v. Munro*, 7 *Clark & Finnelly's Rep.*, 877; *Craigie v. Lewin*, 4 *Curtis' U. S. Circ. Ct. Rep.*, 448; *De Bonneval v. Bonneval*, 1 *Id.*, 856; *Williams v. Saunders*, 5 *Coldwell's (Tennessee) Rep.*, 80.

Where a person has two places of residence, that which was first established may be regarded as his domicile, unless an intention appear to remain at the other as the principal and permanent residence. *Gilman v. Gilman*, 52 *Maine Rep.*, 165; *Guthrie's Savigny*, § 359.

*Intention to change.*

**299.** The intention to change the domicile may be manifested by making and signing a declaration thereof, both in the country of the present and of the intended domicile, before a notary public, or some other officer authorized to administer oaths; a copy of the declaration, certified by the officer, being published in the official journal of the country where made, within one month thereafter.

*McLaren's Law of Wills and Succession*, I., § 9, note, advocates the adoption of provisions as to municipal domicile similar to those of the *Code Napoleon*, Liv. I., Tit. III., §§ 104, 105. The provisions as to international domicile, in 24 and 25 *Vict.*, c. 121, requiring a year's foreign residence, and the filing of a declaration in some public office of the country of the new domicile, are said not to be effectual. (*Hayes & Jarman's Precedents of Wills*, (7th ed.,) p. 541; 2 *Williams' Executors*, (6th ed.,) p. 1409, note.) It is settled in the United States, that a formal declaration in a private instrument as to the place of domicile, is of great though not conclusive weight. [*Ennis v. Smith*, 14 *Howard's U. S. Sup. Ct. Rep.*, 422; *Roberts' Will*, 8 *Paige's (New York) Rep.*, 519; *Burnham v. Rangeley*, 1 *Woodbury & Minot's U. S. Circ. Ct. Rep.*, 9; *Lyman v. Fiske*, 17 *Pickering's (Massachusetts) Rep.*,

284; *Gorham v. Canton*, 5 *Greenleaf's (Maine) Rep.*, 266;] if made previous to the event which raises the question. *Kilburn v. Bennett*, 3 *Metcalf's Rep.*, 199; *Ennis v. Smith*, 14 *Howard's U. S. Sup. Ct. Rep.*, 422. Even with this restriction, (*Lockhart's Trust*, 11 *Irish Jurist*, *N. S.*, 245, 249,) the British courts do not seem to attach much importance to such declarations.

The treaty between France and the Swiss Confederation, respecting the establishment of the members of the one nation within the other, June 30, 1864, 9 *De Clercq*, p. 91, Art. II., provides, that to obtain a domicile or establish a vocation (forme un établissement) in Switzerland, Frenchmen must be furnished with a certificate of registration, stating their nationality, which shall be delivered to them by the French ambassador, after they shall have produced to him certificates of good character and conduct, &c.

In Louisiana, the following act has been passed in relation to political domicile:

"Any alien coming into this State from a foreign country, or from any State of the United States, or any citizen of the United States coming into this State as aforesaid, shall after having resided one year without any interruption in one of the parishes of this State, having in the meantime purchased or rented a house or room or parcel of land, or pursued some profession or employment for a support, be considered as having acquired a residence in the parish where such individual has so resided, and complied with the above requisitions, by making proof of the same before any judge or justice of the peace within this State," (which such official is authorized to receive, record and certify;) "and the oath of the individual applying, supported by the evidence of another, shall be deemed sufficient proof." *Louisiana Law of March 16, 1818*, § 1; *Bulard & Curry's Digest*, p. 286.

Absence on business of the State or of the United States does not, but a voluntary absence from the State for two years, or acquisition of residence out of the State, does forfeit the Louisiana residence. *Id.*, § 3.

A rule very similar to the one stated in the article above, was suggested by Mr. Westlake, and approved in discussion. See *Transactions of National Association for Promotion of Social Science*, 1868, p. 181.

### *Presumption of no intention to change.*

**300.** If the written declaration mentioned in the last article is not made, an intention to change the domicile is presumed not to have existed until the contrary is proved.

The relative force of different facts as presumptive evidence of intention, is specially considered in *Westlake, Private Int. Law*, §§ 48, 49; *Taylor on Evidence*, § 167, (5th ed.)

A change of domicile to a country where the person is a foreigner, is not so easily inferred as a change to one of which he is a member. Lord v.

Colvin, 28 *Law Journal, Chancery*, 373; 4 *Drewry's Rep.*, 423; Whicker v. Hume, 7 *House of Lords Cases*, 159; Moorhouse v. Lord, 10 *Id.*, 286; Crookenden v. Fuller, 1 *Law Times, N. S.*, 73; Hegeman v. Fox, 31 *Barbour's (New York) Rep.*, 482.

*Reverting to original domicil.*

**301.** If a secondary<sup>1</sup> domicil is abandoned, with intent to re-acquire the original domicil,<sup>2</sup> and the person making the abandonment dies on the way to the original domicil, not only his domicil, but the derivative domicils dependent on his,<sup>3</sup> are changed to his original domicil<sup>4</sup> from the time of the abandonment.

<sup>1</sup> If the abandoned domicil is the original domicil, death in transit does not change it. *Graham v. Public Administrator*, 4 *Bradford's (New York) Surrogate Rep.*, 127; *Bell v. Kennedy*, *Law Rep.*, 1 *Scotch Appeals*, 321.

<sup>2</sup> If the secondary domicil is abandoned without an intent to acquire any other determinate domicil, no change is produced. *Lyall v. Paton*, 25 *Law Journal, Chancery*, 746, 750.

It was held, in *Udny v. Udny*, *Law Rep.*, 1 *Scotch Appeals*, 441, that the original domicil revives the moment a secondary domicil is abandoned, and that it is of no importance whether the intention is to re-acquire the original domicil, or another secondary domicil, or whether there is no specific intention whatever except to abandon the existing secondary domicil.

The American cases certainly do not attribute any such adherent power to the original domicil. *Story*, § 47; *Hegeman v. Fox*, 31 *Barbour's (New York) Rep.*, 477, 478; 1 *American Leading Cases*, 747, (4th ed.) And they are supported by the authority of *Savigny*, (*Guthrie's Savigny*, § 359, p. 85.)

See, also, *Boileux*, I., p. 231; *Westlake*, § 40.

<sup>3</sup> *Allen v. Thompson*, 11 *Humphrey's (Tennessee) Rep.*, 538.

<sup>4</sup> It is stated to have been doubted whether the derivative domicil of a child, acquired by his parent's adopting a new domicil during his minority different from that of the child's birth, should be considered the child's original domicil, in such a case. *McLaren's Law of Wills and Succession*, I., p. 6, § 12.

*Official or compulsory change of residence.*

**302.** A change of residence, made in pursuance of official duty,<sup>1</sup> or made upon compulsion,<sup>2</sup> except in case of personal incapacity, provided for in this Chapter, does not change the domicil.

But any person having capacity to change his domicil, who, upon such change of residence, becomes subject to the jurisdiction of the country in which he re-

sides, may acquire a domicile by residing there, with the intention of making that country his home.

<sup>1</sup> *Westlake, Private Int. Law*, § 44, states the following rules in reference to official domicile.

“An office which requires residence, confers a domicile in that place in which the holder is bound to reside.” Under this rule, he instances an ecclesiastical cure, and a person in the East India service.

• “But ambassadors and consuls retain the domicile of the country which they represent or serve.” It is well settled, however, that consuls may acquire a domicile for many purposes in the place of residence; and the rule stated in the above article, allowing all officers subject to the local jurisdiction to do so, is suggested as embodying the principle that ought to control, whatever be the class of officers.

It was held, in *Sharpe v. Crispin*, 38 *Law Journal*, (*Probate*), 17; 1 *Eng. Law Rep.*, (*Probate & Divorce*), 611, that the mere residence in a foreign country as a public officer, gives rise to no inference of a domicile in that country; but, (as was also held, in *Heath v. Samson*, 14 *Beavan's Rep.*, 441,) if one already there domiciled and resident, accept an office in the public service of another country, he does not thereby destroy his domicile. The acceptance of an irrevocable appointment for life, and a change of residence accordingly, sufficiently proves an intent to change the domicile. 4 *Phillimore's Int. Law*, §§ 104, 105.

<sup>2</sup> *Burton v. Fisher*, 1 *Milward*, 183; *Westlake*, § 53; *Boileux*, I., p. 220; *Duranton*, I., no. 373, p. 303; *Chauveau sur Carré Pr.*, 337; *Hardy v. De Leon*, 5 *Texas Rep.*, 237; *Re Duchesse d'Orleans*, 1 *Swabey & Tristram's Rep.*, 253, (Lunatic); *Hepburn v. Skirving*, 9 *Weekly Rep.*, 764; 4 *Phillimore*, p. 127, et seq.

An exception, where the prospect of return is excluded, (e. g. in the case of banishment for life,) is contended for by *Westlake*, § 53, and *Phillimore*, vol. 4, § 191.

*Duranton*, (*supra*), very properly restricts the exception to the municipal domicile of the party. So the partial compulsion arising from ill-health does not prevent the change. *Haskins v. Mathews*, 8 *De Gex MacN. & G.*, 13; *Hegeman v. Fox*, 31 *Barbour's (New York) Rep.*, 483.

The domicile of a slave is that of his master while the slave continues such and remains within the territorial limits of a nation whose laws recognize the condition of slavery. *Phillimore's Law of Domicil*, ch. 7, § 4; *Merlin, Répertoire de Jurisprudence*, 6, p. 229; *Esclavage*, (5th ed.,) 11, p. 75; (7 *Opinions of U. S. Attorneys-General*, p. 278; [Cushing, A. G.];) 2 *Hurd on Freedom and Bondage*, p. 774. But it is hardly necessary to make any provision for slavery.

*What law determines change of domicile.*

**303.** The law then in force<sup>1</sup> of the nation within whose territory a person takes up his residence,<sup>2</sup> determines the age<sup>3</sup> at which he may choose a domicile therein,



the mental capacity requisite therefor,<sup>4</sup> and what constitutes freedom<sup>5</sup> and good faith.

<sup>1</sup> Although no authority has been found for this application of the rule against the retroactive effect of laws, there seems to be no reason for making this case an exception to that rule.

<sup>2</sup> The existing rules would perhaps refer this question to the law of the country of the former domicil, (see notes below;) but it is suggested by this article to permit each nation to determine, through its own laws, who shall have capacity to acquire a domicil within its territory. It has been held, that one who has abandoned his residence, and departed from the State with intent to seek a domicil elsewhere, is to be regarded as having lost his domicil in the former State, for the purposes of taxation. *Colton v. Inhabitants of Long Meadow*, 94 *Massachusetts Rep.*, 598.

But it is necessary, for purposes of succession and some others, to consider the character of one domicil as clinging to the person until a new one has been acquired; and an uniform application of this principle to all questions seems desirable.

<sup>3</sup> *Felix*, Livre I., Titre 1, no. 33, tome 1, p. 81; no. 28, p. 57. In *Hiestand v. Kuns*, 8 *Blackford*, (*Ind.*,) 345, a minor domiciled in Ohio, where the age of majority is eighteen, was held to have capacity to acquire a domicil of election at eighteen in Indiana, where the age of majority is twenty-one. It cannot be doubted, "that under those systems of law " which recognize the distinction of pupilarity and majority, a minor beyond the age of pupilarity has the capacity of acquiring a domicil for " himself." *McLaren's Law of Wills and Succession*, § 12, p. 6; *Arnott v. Groom*, *Session Cases*, 2nd series, vol. IX., p. 142, 24 Nov. 1846; *Erskine*, I., 7, 14; *Robertson*, *Personal Succession*, p. 201; *Stephens v. McFarland*, 8 *Irish Equity Rep.*, 444.

It has been denied, however, that the law of his new domicil would incapacitate him from the time of the change. *Savigny*, (*Guthrie's Translation*,) p. 125; *Puchta Vorlesungen*, 2, § 113, s. 251, (5th ed.) That it would, was held in *Hiestand v. Kuns*, (above,) following *Story, Conflict of Laws*, §§ 67, 69. It certainly would not, if his subsequent removal was to his original domicil.

<sup>4</sup> A person incapable in other respects may still have capacity to change his domicil. *Concord v. Rumney*, 45 *New Hampshire Rep.*, 428; *Holyoke v. Haskins*, 5 *Pickering's (Massachusetts) Rep.*, 26.

<sup>5</sup> An interdicted minor cannot change his domicil. *Felix*, I., p. 57, no. 28, note 2. (His reference to Voet ad Pand., Lib. 5, Tit. 1, § 100, seems not in point.)

It was held, in *Sharpe & Sharpe v. Crispin*, *Eng. Law Rep., Probate & Divorce*, vol. I., p. 611, that "If a man at the time he attains his majority is of unsound mind, and remains in that state continuously up to the time of his death, the incapacity of minority never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicil for his son, and a change of domicil by the father will usually produce a similar change of domicil as regards the lunatic son."

*Nationality not affected.*

**304.** A change of domicile does not necessarily effect a change of national character.

Natural allegiance fixes the *political status* of an individual, and the law of the domicile determines his *civil status*. By Lord WESTBURY. To suppose that for a change of domicile there must be a change of natural allegiance, is to confound the political and the civil *status*, and to destroy the distinction between *patria* and *domicilium*. *Udny v. Udny*, *Law Rep.*, 1 *House of Lords Sc. Cas.*, 441. *Haldane v. Eckford*, *Law Rep.*, 8 *Equity Cas.*, 631; *Whicker v. Hume*, 13 *Beavan's Rep.*, 401; *Stanley v. Bernes*, 3 *Haggard's Eccl. Rep.*, 373, 447, (reversing *Curling v. Thornton*, 2 *Adams' Rep.*, 6); 25 *Beavan's Rep.*, 232; *Felix*, I., p. 58, note 7; 127, note; 133, note 2; *McLaren's Law of Wills and Succession*, p. 11, § 21; *White v. Brown*, 1 *Wallace, Jr.'s U. S. Circuit Ct. Rep.*, 265.

To the contrary, *Felix*, I., p. 58, note 29; *Marcy*, cited *Wheaton*, (6th ed.,) p. 132; *Heffter*, (3rd ed.,) p. 109; *Re Cassdeville*, 33 *Law Journ. Eccl.*, 306; *Attorney-General v. Blucker*, 34 *Law Journ. Eccl.*, 29.

## CHAPTER XXIII.

### EFFECT OF CHANGE OF DOMICIL.

ARTICLE 305. Change not retroactive.

306. Law of new domicile applies.

*Change not retroactive.*

**305.** A change of domicile has no retroactive effect.

*Voet ad Pandect.*, Lib. 10, Tit. 2, § 29.

Either on the domicile of the person himself, or on the derivative domicils dependent on his. *Allen v. Thompson*, 11 *Humphrey's (Tennessee) Rep.*, 538, 539; *Bell v. Kennedy*, *Law Rep.*, 1 *Scotch Appeals*, 321.

*Law of new domicile applies.*

**306.** Upon a change of domicile, the law of the new domicile has thenceforth<sup>1</sup> the like effect upon the person acquiring it as the law of his preceding domicile had theretofore produced.<sup>1</sup>

<sup>1</sup> *Felix*, *Droit Intern. Privé*, I., no. 28, p. 58, and note 2.

<sup>2</sup> *Story*, *Conflict of Laws*, § 69.

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TITLE VIII.

## NATIONAL JURISDICTION.

- ARTICLE 307.** "Jurisdiction" defined.  
308. Territorial jurisdiction.  
309. Extra-territorial jurisdiction.  
310. "Law of place" defined.  
311. Conflict of concurrent jurisdiction.  
312. Subjects of jurisdiction.  
313. Limits of exercise as to foreigners.  
314. Foreign military and naval forces.

*"Jurisdiction" defined.*

**307.** The jurisdiction of a nation is its authority to govern, whether by legislative, executive or judicial power. It is either :

1. Territorial ; or,
2. Extra-territorial.

*Territorial jurisdiction.*

**308.** The territorial jurisdiction of a nation extends over all the places within its geographical limits, as defined by Chapter IV., on TERRITORY.

*Extra-territorial jurisdiction.*

**309.** The extra-territorial jurisdiction of a nation, exclusive or concurrent, extends over the following places :

1. All the land or water included within the lines of its fleets or armies,<sup>1</sup> exclusive in respect to its own members, and concurrent<sup>2</sup> with that of the nation owning the territory, in respect to members of that or of any other nation ;

2. All ships bearing its national character, exclusive<sup>3</sup> except in the case of a private<sup>4</sup> ship within the limits of another nation, and in that case, concurrent with such nation ;

3. All territory discovered or colonized by the nation, as provided in title II., on EXTRA-TERRITORIAL ACTION, to the extent of its occupation thereof, as therein defined ; and,

4. All places occupied by its marine telegraphs, light-houses, buoys, and other structures or property, not within the territory of any other nation, for the purposes of protecting such property and structures, and redressing injuries thereto.

<sup>1</sup> *Phillimore's International Law*, 215.

<sup>2</sup> This qualification is obviously necessary.

<sup>3</sup> As to public ships, the jurisdiction is exclusive. 1 *Phillimore's Int. Law*, 367 ; The Santissima Trinidad, 7 *Wheaton's U. S. Supreme Ct. Rep.*, 288. The restriction to *ships of war*, made by the language of some authorities, it does not seem desirable to retain. Exceptions in the case of prize are reserved, to be treated in the Book on WAR.

<sup>4</sup> In this article a ship is regarded as a place, although vessels at sea are no longer considered as part of the territory of a nation. The flag protects nothing but the vessel, and only designates to what portion of the globe she belongs. Jurisdiction over what is on board ship is, therefore, extra-territorial. *Johnson v. Twenty-one Bales, &c.*, 2 *Paine's U. S. Circuit Ct. Rep.*, 601 ; S. C., 6 *American Law Journal*, 68.

<sup>5</sup> 1 *Phill. Int. Law*, 373 ; The Exchange *v. McFadden*, 7 *Cranch's U. S. Rep.*, 116. To the contrary, *Mahler v. Transportation Co.*

### “*Law of place*” defined.

310. The expression, “law of place,” as used in this Code, signifies the law of the nation or State<sup>1</sup> within whose jurisdiction,<sup>2</sup> territorial or extra-territorial, for the time being, the transaction is had,<sup>3</sup> or the subject exists.

<sup>1</sup> A question may arise here as to the proper rule to be applied on a question on which the local and the national or federal tribunals are at variance, as is the case upon some subjects of commercial law in the American courts.

<sup>2</sup> The definition is not limited to the exclusive jurisdiction, as there is a small class of cases in which the jurisdictions are concurrent, yet do not conflict. The case of conflict is provided for by the next article.

<sup>3</sup> There is another qualification which, according to some authorities, should be added, viz., that which *was* the law at the time of the transaction. But it should seem that the effect of a change in the law is a municipal and not an international question ; and this article leaves the effect of a change of the law of place to be determined according to that law.

*Conflict of concurrent jurisdiction.*

**311.** In case of a conflict in the exercise of concurrent jurisdiction, as defined in article 309, the territorial jurisdiction is paramount to the extra-territorial, except where otherwise provided in this Code.

Persons attached to a foreign public ship do not by landing come under the territorial jurisdiction. *Wheaton's Elements of International Law*, v. 1, pt. 2, ch. 2; *Ortolan, Règles Int. et Dipl. de la Mer*, v. 1, 195.

*Subjects of jurisdiction.*

**312.** The jurisdiction of a nation extends to the following subjects :

1. To all persons and things in the places subject to its jurisdiction, territorial or extra-territorial, except as otherwise provided in this Code ;

2. To its own property in other places, except as otherwise provided in this Code ;

3. To all its own members and their property in any other places, in the cases provided in this Code, and in no other ;

4. To the regulation of all transactions completed within its limits between living persons ; and,

5. To the regulation of the devolution, at death, of all the movable property of all persons domiciled therein at the time of their death.

*Limits of exercise as to foreigners.*

**313.** The jurisdiction of a nation, so far as it affects foreigners or foreign nations, is to be exercised subject to the provisions of this Code.

*Foreign military and naval forces.*

**314.** In the case of military or naval forces of one nation occupying, or in transit through, the territory of another nation, by the consent of the latter, the jurisdiction of the former over the members of such forces is subject to the conditions of the consent.

## TITLE IX.

## DUTIES OF A NATION TO FOREIGNERS.

- CHAPTER XXIV. Personal condition of foreigners.  
XXV. Personal rights.  
XXVI. Rights of property.  
XXVII. Wrecks.

This title is restricted to those rights of foreigners which are secured by the Code only to members of nations uniting in it. The numerous rights and obligations which are applicable to all nations whatever, and all foreigners, of whatever nationality, are among the subjects treated under Division Second, concerning PRIVATE INTERNATIONAL LAW.

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## CHAPTER XXIV.

## PERSONAL CONDITION OF FOREIGNERS.

- ARTICLE 315. Who are foreigners.  
316. Laws of a nation are applicable to foreigners.  
317. Duty to administer justice.

*Who are foreigners.*

**315.** The national character of persons as foreigners or members of the nation, and the domicil of foreigners, are defined in Titles VI. and VII.

*Laws of a nation are applicable to foreigners.*

**316.** Except as is herein otherwise expressly provided, foreigners, while within the places subject to the jurisdiction of a nation, are, equally with the members of the nation, subject to its laws, and entitled to the protection thereof, for their persons and their property.

*Ferguson on Marriage and Divorce*, 57; *Reeding v. Smith*, 2 *Haggard's Consistory Rep.*, pp. 371, 384-386, by Lord STOWELL; 1 *Kent's Commen-*

*taries*, 36; *Woolsey's International Law*, 96; *Bluntschli, Droit International Codifié*, § 386.

The right of resort to the tribunals is defined by the Chapter concerning JUDICIAL POWER IN CIVIL CASES, in Part VI., entitled ADMINISTRATION OF JUSTICE.

*Duty to administer justice.*

**317.** It is the duty of a nation to administer justice, where foreigners or other nations are concerned, in the cases specified in Part VI., entitled ADMINISTRATION OF JUSTICE.

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## CHAPTER XXV.

### PERSONAL RIGHTS OF FOREIGNERS.

#### SECTION I. Rights of residence.

##### II. Of occupation.

##### III. Of religion.

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#### SECTION I.

##### RIGHTS OF RESIDENCE.

#### ARTICLE 318. Commercial intercourse.

319. Free entry of foreigners.

320. Traffic in laborers.

321. Exclusion.

322. Passports and safe conducts.

323. Effect of safe conduct.

324. Effect of passport.

325. Passports not to be required.

326. Armed expeditions.

327. Searches and seizures.

328. Unusual burdens not to be imposed.

329. Removal.

*Commercial intercourse.*

**318.** No nation has the right to interdict absolutely, the entrance of foreigners into its territory, or to close the country to general commerce.

*Bluntschli, Droit Intern. Codifié*, § 381.

The original doctrines of international law would not sustain this position, but whatever doubts may have been raised on the point are now practically settled by many treaties of friendship and commerce which have established among Christian nations the rule stated in the article.

*Free entry of foreigners.*

**319.** Members of any nation, with their families and property, may freely enter, reside and become domiciled in any other nation, subject to the provisions of this Code, and of special compacts, and subject to the revenue, sanitary, police and other laws of the country, so far as the same are applicable to foreigners.

This is according to the rule stated by *Kent*, (1 *Commentaries*, 35), as the one which is now generally settled in commercial treaties. *Vattel*, (*Law of Nations*, Bk. 2, ch. 8, §§ 100, 101,) after speaking of the right of the lord of the territory to impose conditions, says: but in Europe the access is everywhere free to every person who is not an enemy of the State, except in some countries to vagabonds and outcasts, upon the tacit condition, however, of obedience to the laws.

The exceptions of paupers, criminals, enemies, &c., are provided for in Chapter XVII., concerning ASYLUM, and in Book Second, on WAR.

*Traffic in laborers.*

**320.** Engaging, transporting, or employing laborers taken from any country whatever, and bound to service, whether for a fixed term or otherwise, excepting emigrants removing by their own free and intelligent consent, is a public offense; and all agreements for service entered into with reference to such traffic are void.

Suggested by the act of Congress of the United States, Feb. 19, 1862, (12 *U. S. Stat. at L.*, 340,) to prohibit the "*Coolie trade*," which provides, that no citizen of the United States, or foreigner coming into or residing within the same, shall, for himself, or for any other person whomsoever, either as master, factor, owner, or otherwise, build, equip, load, or otherwise prepare, or send to sea, or navigate any ship, for the purpose of procuring from China, or from any port or place therein, or from any other port or place, the inhabitants or subjects of China, known as "*Coolies*," to be transported to any foreign country, port or place whatever, to be disposed of, or sold, or transferred for any term of years, or for any time whatever, as servants or apprentices, or to be held to service or labor; or take on board of any ship, or receive, or transport any such persons, for the purpose of so disposing of them; or knowingly be engaged in anywise aiding or abetting therein. But nothing in the act is to be deemed



or construed to apply to, or affect any free or voluntary emigration of any Chinese subject.

### *Exclusion.*

**321.** No nation can expel the members of another nation without special cause, which must be explained to the nation the members of which are expelled.<sup>1</sup>

But this and the last article do not affect the right of a nation to punish crime by transportation or banishment.

<sup>1</sup> This is the rule stated by *Heffter, Droit International*, § 33, cited in *Woolsey, Intern. Law*, p. 94, ¶ 6.

It is proposed as a more reasonable and liberal rule than that laid down by *Phillimore, Intern. Law*, vol. I., p. 407.

*Phillimore* says, that "it is a received maxim of international law that the government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it." *Id.*, p. 233.

*Martens* says, that the sovereign has a right to forbid foreigners to enter his dominions, without express permission first obtained, even if such entry be not prejudicial to the State; but no European power now refuses in time of peace, to grant permission; nor is it even necessary for such subject to ask permission. *Marten's Law of Nations*, Bk. 3, ch. 3, § 2.

These restrictive rules, however, are founded upon the old doctrine that one of the functions of government was to suppress the free movements of populations, and that the subjects of a State had no right to leave it without the assent of the government. See *Marten's Law of Nations*, Bk. 3, ch. 3, § 6.

Those rules are not in harmony with the general spirit of international law, as now manifested.

From *Vattel's* reasoning it should seem that a nation is authorized, and indeed bound to open its doors, and give protection to all strangers who come to it, except those who, by the *quality and frequency of their crimes are entitled to a home nowhere*, but who, *being enemies of the whole human family*, are subject to punishment wherever they go. 1 *Opinions of U. S. Attorneys-General*, 514.

Subject to the restrictions rendered necessary by criminal justice, "the right of protecting all who may come within the bounds of an independent community has been always held one of the most valuable prerogatives of sovereignty, and any invasion of it has ever been strenuously contested." *Ward's Law of Nations*, vol. 2, p. 319.

And the object of protection seems sufficiently attained by allowing the exclusion upon definite reasons assigned, as in the foregoing article.

<sup>2</sup> This qualification is suggested by the treaty of friendship, &c., between France and San Salvador, Jan. 2, 1858, 7 *De Clercq*, 362.

The treaty of friendship, commerce and navigation between France and Peru, March 9, 1861, Art. III., (8 *De Clercq*, 193,) provides, that the members of one nation cannot be arrested or expelled from the other country, nor transported from one place to another within it, without sufficient reason, nor without the observance of the legal formalities and requirements; also, that the causes that render necessary such measures, and the documents which establish them, should be at a proper day communicated to the diplomatic or consular agents of their nations respectively; and in all cases, sufficient time should be accorded to persons concerned to present their defense, and to take, with the diplomatic or consular agents, the necessary measures for the protection of their property, and the property of others in their possession. These provisions, however, are not to hinder the execution of judgments according to the laws of the country.

To somewhat similar effect are the treaties of friendship, commerce and navigation between France and

Honduras, Feb. 22, 1856, Art. IV., 7 *DeClercq*, 10.

San Salvador, Jan. 2, 1858, " V., 7 *Id.*, 365.

### *Passports and safe-conducts.*

**322.** A nation may, in its discretion, give passports to any of its members,<sup>1</sup> and safe-conducts to any persons whomsoever.

Safe-conducts may be issued by the executive government of the nation. Passports may be issued by the executive government at home, or by its authorized public agents abroad,<sup>2</sup> as provided in articles 123 and 173.

<sup>1</sup> *Dana* says, that perhaps a passport might be issued to a person in the employ of the government, though not a member of the nation; but it is doubtful whether that should be allowed.

By the *United States Consular Regulations*, ¶ 102, persons who have merely declared their intention to become citizens are not citizens of the United States, within the meaning of the law giving to consuls power to issue passports, for such declaration has not the effect of naturalization.

<sup>2</sup> The issue in time of war is further provided for in Book Second, on WAR.

### *Effect of safe-conduct.*

**323.** A safe-conduct must be everywhere respected as a protection to the person to whom it is issued, except from liability to punishment for crime committed after its issue.

*Effect of passport.*

**324.** A passport is a certificate that the holder is a member of the nation by which it is given.

It must, until revoked, be taken in every other nation as conclusive evidence of such membership, subject to the local regulations for verification ; and also subject, in the administration of justice in civil cases, to the rules of evidence applicable in the tribunals.

See a somewhat different provision as to effect of passports of ships, in Article 279.

The United States have treaties with several Powers regulating the rights of naturalized citizens of the United States, on their return to their native lands. The protection which the *passport* gives is regulated in every such case by the terms of the treaty. Copies of several of these treaties are given in Appendix No. 2, of *U. S. Consular Regulations*, 1870.

Certificates of citizenship have heretofore been issued by diplomatic and consular agents of the United States to persons residing in foreign lands, and claiming to be American citizens. But the issue of such certificates, except in the form of passports, is now expressly prohibited. *U. S. Cons. Reg.*, ¶ 109.

*Passports not to be required.*

**325.** No nation, unless engaged in war, shall require passports from members of the other nations.

This rule, already practically adopted by several nations, should seem a reasonable and convenient one for all the nations uniting in the Code. Some of the treaties, however, sanction the requirement of passports ; for instance, that of the United States with the Swiss Confederation, Nov. 25, 1850, Art. IV., 11 *U. S. Stat. at L.*, 589.

During the Franco-Prussian war of 1870, France required passports duly certified by the French authorities, from all persons landing in France, without respect to age, sex, or nationality. They who were not thus provided were liable to be turned back or detained.

*Armed expeditions.*

**326.** The liberty of entry into a nation extends only to individuals and peaceful companies. Armed foreigners are not entitled to admission into the territory of a nation, without express permission first obtained.

*Marten's Law of Nations*, Bk. 3, ch. 3, § 2 ; *Bluntschli, Droit Intern. Codifié*, § 383.

*Searches and seizures.*

**327.** The right of foreigners to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, must not be violated, and domiciliary visits can not be made in respect to them, without legal warrant.

This provision is from the treaty between Great Britain and

Colombia, Feb. 16, 1866, Art. XVIII., { *Accounts and Papers*, 1867,  
vol. LXXIV., (36.)

Italy, Aug. 6, 1863, " XVII., { *Accounts and Papers*, 1864,  
vol. LXVI., (35.)

Constitution of the United States, 4th Amendment.

Treaty between the United States and

Hayti, Nov. 3, 1864, Art. VIII., 13 *U. S. Stat. at L.*, 711.

The latter provides, that "there shall be no examination or inspection of the books, papers, or accounts of the citizens of either country residing within the jurisdiction of the other, without the legal order of a competent tribunal or judge."

The treaty between the United States and Peru, July 26, 1851, Art. XIX., (10 *U. S. Stat. at L.*, 934,) provides, that citizens of one nation within the other shall not be liable to imprisonment without formal commitment under a warrant signed by a legal authority, except in cases *flagrantis delicti*, and shall in all cases be brought up for examination within twenty-four hours after arrest, and if not so examined shall be discharged.

*Unusual burdens not to be imposed.*

**328.** No other or more burdensome conditions can be imposed on foreigners, or on their enjoyment of the rights mentioned in this Code, than on the members of the nation where they reside.

But this provision does not extend to the exercise of political rights, nor to a participation in the property of communities, corporations, or institutions of which such foreigners shall not have become lawful members or co-proprietors.

This provision is from the treaty between the United States and the Swiss Confederation, Nov. 25, 1850, Art. I., 11 *U. S. Stat. at L.*, 588. Many other treaties contain a provision to the same general effect. A clause securing equality of taxes and imposts is contained in most of the other treaties of the United States; but that subject is more specifically regulated in Chapter XXX., entitled TAXATION.

The uniformity of charges upon vessels is more specifically treated in the Title on IMPOSTS, in Part III., entitled UNIFORM REGULATIONS FOR MUTUAL CONVENIENCE.

The treaty between France and Switzerland, concerning the establishment of members of either nation within the other, June 30, 1864, (9 *De Clercq*, 91,) subsequently extended to the French colonies, (9 *Id.*, 372,) provides that Frenchmen, without distinction of faith, shall be received and treated in each canton of Switzerland in the same manner as those of Christian faith who come from the other cantons of Switzerland, and shall not be subjected to any other burdens than such members of other cantons, and declares the rule for the Swiss in France to be reciprocal.

### *Removal.*

**329.** Foreigners have the right at all times freely to quit the territory, if not detained for crime or debt, pursuant to the laws.

*Bluntschli, Droit Intern. Codifié*, § 392.

Removal in case of war is provided for in Book Second, on WAR.

## SECTION II.

### RIGHTS OF OCCUPATION.

ARTICLE 330. Commercial occupations.

331. Vocations generally.

### *Commercial occupations.*

**330.** Members of any nation are at liberty, subject to the provisions of this Code, freely to come with their ships and other property to all resorts of commerce in the territory of the other nations; to acquire real and personal property for any lawful occupation; to manage their own affairs themselves or by such agencies as they please; and to carry on trade lawfully in the country.

This article is suggested by the following treaties, by which its substance is to a greater or less degree already adopted between the nations specified.

Treaty between Great Britain and

Salvador, Oct. 24, 1862, *Accounts & Papers*, 1863, vol. LXXV., (47.)

Nicaragua, Feb. 11, 1860, *Id.*, 1860, vol. LXVIII., (30.)

Mexico, Feb. 26, 1826, 3 *Hertell*, 251.

Colombia, Feb. 16, 1866, *Accounts & Papers*, 1867, vol. LXXIV., (36.)

Italy, Aug. 6, 1863, *Id.*, 1864, vol. LXVI., (35.)

Belgium, July 23, 1862, *Id.*, 1863, vol. LXXIII., (45.)

And see Treaty between Great Britain and

Prussia, August 16, 1865, *Accounts & Papers*, 1866, vol. LXXVI., (38.)

Treaty between the United States and

Dominican Republic, Feb. 8, 1867, Art. III., VI., 15 *U.S.Stat. at L.*, 60.

Guatemala, March 3, 1849, "III., IV., XI., 10 *Id.*, 874.

San Salvador, Jan. 2, 1850, " III., IV., 10 *Id.*, 891.

Argentine Confed- } July 27, 1853, " II., VIII., 10 *Id.*, 1006, 1008.  
eration,

Nicaragua, June 21, 1867, " II., 15 *Id.*, 169, 171.

Honduras, July 4, 1864, " II., 13 *Id.*, 700.

Hayti, Nov. 3, 1864, " VI., 13 *Id.*, 713.

Bolivia, May 13, 1858, " III., 12 *Id.*, 1005.

Venezuela, Aug. 27, 1860, " 12 *Id.*, 1144-1147.

Swiss Confederation, Nov. 25, 1850, " I., 11 *Id.*, 588.

Two Sicilies, Oct. 1, 1855, " 11 *Id.*, 643-647.

Persia, Dec. 13, 1856, " 11 *Id.*, 709, 710.

Costa Rica, July 10, 1851, " II., 10 *Id.*, 917.

Peru, July 26, 1851, " 10 *Id.*, 926-930.

Hanover, June 10, 1846, " 9 *Id.*, 864.

New Granada, Dec. 12, 1846, " III., 9 *Id.*, 882.

Mecklenburg- } Dec. 9, 1847, " X., 9 *Id.*, 918.  
Schwerin,

Hawaiian Islands, Dec. 20, 1849, Art. VIII., IX., 9 *Id.*, 979.

Treaty between France and

Austria, Dec. 11, 1866, 9 *De Clercq*, 646.

Netherlands, July 7, 1865, 9 *Id.*, 337.

Nicaragua, April 11, 1859, 7 *Id.*, 586.

Russia, June 14, 1857, 7 *Id.*, 278.

San Salvador, Jan. 2, 1858, 7 *Id.*, 362.

Honduras, Feb. 22, 1856, 7 *Id.*, 10.

And see 5 *De Clercq*, 602.

Citizens and foreigners are also placed on an equality in respect to property and business, by the following :

Treaty of commerce and navigation between France and

The Free Cities of Lu- }  
bec, Bremen, and } March 4, 1865, Art. I., 9 *De Clercq*, 187.  
Hamburg,

The Grand Duchy of }  
Mecklenburg-Schwe- }  
rin, (Extended to } June 9, 1865, Art. I., 9 *Id.*, 295.  
the) Grand Duchy of }  
Mecklenburg-Stre- }  
litz,

Treaty of commerce between France and

Austria, 11 December, 1866, 9 *De Clercq*, 646.

These references might be extended by enumerating earlier treaties, but enough are given to show the virtual abandonment of the old principle of the disabilities of aliens. Many of the treaties simply authorize *hiring*.

*Vocations generally.*

**331.** Members of any nation have the same rights of following any vocation in any of the others, as the members of the latter. But this provision does not extend to officers and official trusts; and is subject, also, to the right of the State to determine by law what persons may engage in particular occupations within it.

The treaties referred to under Article 329 do not generally extend the stipulations for rights of occupation to other vocations than those of commerce. The Treaty between the United States and the Swiss Confederation, however, extends to it all professions. See, also, treaty between France and Peru, March 9, 1861, Art. II., 8 *De Clercq*, 193.

By the treaty between the United States and The Two Sicilies, Oct. 1, 1855, (11 *U. S. Stat. at L.*, 639, Art. VI.,) it is provided that the reciprocity established shall not extend to premiums which either nation may grant to their own citizens or subjects to encourage the building of ships to sail under their own flag.

For a statement of the existing rules in England, France, and several other countries, as to the disabilities of aliens, and a history of the relaxation of these restrictions, see *Alexander Cockburn on Nationality*, ch. 5.

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## SECTION III.

### RIGHTS OF RELIGION.

**ARTICLE 332.** Freedom of conscience.

333. Sepulture.

*Freedom of conscience.*

**332.** Foreigners cannot be molested, prejudiced, or questioned, for their religious belief, or practice in worship, or be compelled to conform to the religious worship of others; but they must not show disrespect towards the religion, laws, and established customs of the nation in which they may be, and must not indulge

in practices inconsistent with the good order and safety of the State.

This is the American doctrine, and is submitted as the true rule upon this subject, and the one towards which all nations are steadily tending. It is already embodied substantially in the treaty provisions of many nations of various religious characters.

Treaty between the United States and

San Salvador,	Jan. 2, 1850, Art. XIV.,	10 <i>U. S. Stat. at L.</i> , 893.
Guatemala,	Mar. 3, 1849, “ XIII.,	10 <i>Id.</i> , 878.
Paraguay,	Feb. 4, 1859, “ XIV.,	12 <i>Id.</i> , 1098.
Nicaragua,	June 21, 1867, “ XII.,	15 <i>Id.</i> , 67.
Hayti,	Nov. 3, 1864, “ VIII.,	13 <i>Id.</i> , 714.
Venezuela,	Aug. 27, 1860, “ IV.,	12 <i>Id.</i> , 1145.
Honduras,	July 4, 1864, “ XII.,	13 <i>Id.</i> , 706.
Bolivia,	May 13, 1858, “ XIV.,	12 <i>Id.</i> , 1011.
Japan,	July 29, 1858, “ VIII.,	12 <i>Id.</i> , 1058.
Costa Rica,	July 10, 1851, “ XII.,	10 <i>Id.</i> , 923.
Peru,	July 26, 1851, “ XX.,	10 <i>Id.</i> , 935.
Argentine Con- federation.	} July 27, 1853, “ XIII.,	10 <i>Id.</i> , 1011.
New Granada,		
	Dec. 12, 1846, “ XIV.,	9 <i>Id.</i> , 887.
Hawaiian Islands,	Dec. 20, 1849, “ XI.,	9 <i>Id.</i> , 981.

The treaty with Paraguay restricts the right of worship, by protecting aliens in the proper exercise of their religion in private, in their own dwellings or in the dwellings or offices of consuls or vice-consuls of the United States.

The treaty with the Argentine Confederation, July 27, 1853, (10 *U. S. Stat. at L.*, 1011, Art. XIII.,) adds : or in their own churches or chapels, which they shall be at liberty to build and maintain, in convenient situations, to be approved by the local government.

The extent of the rule established by the comity of nations, as it is stated by *Twiss*, (1 *Intern. Law*, 309, § 204,) is this :

“ A foreign public minister is entitled to the free exercise of his religion, within his house, for himself and his countrymen, subject to the right of the sovereign of the country to forbid acts which make it an object of public notice.”

But the existing rule appears to be more liberal, and might be stated thus :

“ Foreigners are at liberty to adopt any religion, and to practice the rites and observe the ceremonies thereof, except so far as such religion, or its rites or ceremonies, are prohibited by the positive law of the nation in which they are.”

This rule is recognized by the following treaties :



## Treaty between Great Britain and

Colombia,	Feb. 16, 1866, Art. XV.,	{ <i>Accounts and Papers</i> , 1867, vol. LXXIV., (36.)
Madagascar,	June 27, 1865, " III.,	{ <i>Accounts and Papers</i> , 1867, vol. LXXIV., (36.)
San Salvador,	Oct. 24, 1862, " XVIII.,	{ <i>Accounts and Papers</i> , 1863, vol. LXXV., (47.)
Nicaragua,	Feb. 11, 1860,	{ <i>Accounts and Papers</i> , 1860, vol. LXVIII., (30.)

See the French treaties, cited under the next article.

*Sepulture.*

**333.** Foreigners may be buried in the country in which they die, either in the ordinary cemeteries, or in burial places of their own; and such burial places for- eigners are at liberty, without distinction on account of religion, race, or nationality, to establish and main- tain, in situations approved by the local government.

Funerals, sepulchres of the dead, and ceremonies of exhumation,<sup>1</sup> shall not be molested or disturbed.

This provision is in substance from the treaties between the United States and

Nicaragua,	June 21, 1867, Art. XII.,	15 <i>U. S. Stat. at L.</i> , (Tr.), 67.
Honduras,	July 4, 1864, " XII.,	13 <i>Id.</i> , 706.
Hayti,	Nov. 3, 1864, " VIII.,	13 <i>Id.</i> , 714.
Bolivia,	May 13, 1858, " XIV.,	12 <i>Id.</i> , 1011.
Venezuela,	Aug. 27, 1860, " IV.,	12 <i>Id.</i> , 1145.
Paraguay,	Feb. 4, 1859, " XIV.,	12 <i>Id.</i> , 1098.
Guatemala,	Mar. 3, 1849, " XIII.,	10 <i>Id.</i> , 878.
San Salvador,	Jan. 2, 1850, " XIV.,	10 <i>Id.</i> , 893.
Costa Rica,	July 10, 1851, " XII.,	10 <i>Id.</i> , 923.
Peru,	July 26, 1851, " XX.,	10 <i>Id.</i> , 935.
Argentine Con- federation,	{ July 27, 1853, " XIII.,	10 <i>Id.</i> , 1011.

New Granada, Dec. 12, 1846, " XIV., 9 *Id.*, 887.

And the treaties between Great Britain and Colombia, Salvador and Nicaragua, referred to at the end of note to the preceding article.

Some of the treaties of France contain similar provisions. See that with

Peru, March 9, 1861, 8 *De Clercq*, 193.

Nicaragua, April 9, 1859, 7 *Id.*, 586.

<sup>1</sup> Treaty between France and

New Granada, May 15, 1856, Art. VII., 7 *De Clercq*, 103.

## CHAPTER XXVI.

## RIGHTS OF PROPERTY.

ARTICLE 334. Foreigners enabled to enjoy property.

335. Foreigners enabled to transmit property.

336. Right to remove property.

337. Absence of heirs.

338. Death of persons who are foreigners, or not domiciled.

339. Consul may send home assets of seamen, &c.

340. Consul entitled to administer.

341. Security not required.

342. Local authorities to administer in absence of consul and all other authorized persons.

343. Notice to be given of successions in which foreigners are interested.

344. Secretary of legation to act, if there be no consul.

*Foreigners enabled to enjoy property.*

**334.** Subject to the right of eminent domain, defined by article 50, a foreigner, equally with a member of the nation, may take, hold, transfer, and otherwise dispose of property, movable or immovable.

This and the next article are from the *Civil Code, Reported for New York*.

The convention between France and Austria, for the regulation of successions, December 11, 1866, (9 *De Clercq*, p. 675,) provides, that the members of either nation may give and receive by will, legacy, gift or otherwise, or by succession from intestates, property situated in the other country, in the same manner as the members of the nation, and shall not be charged with heavier rates of succession or transfer than those which are imposed, under like circumstances, upon the members of the nation, and that they may have their wills drawn up by the consuls of their nation.

The same rule as to succession is, in substance, embodied in many treaties, though in some as to personalty only.

See the treaty between France and

- Peru, Mar. 9, 1861, 8 *DeClercq*, 193.  
 Nicaragua, Apr. 11, 1859, Art. VI., 7 *Id.*, 586.  
 San Salvador, Jan. 2, 1858, " VIII., 7 *Id.*, 362.  
 New Granada, May 1856, " VIII., 7 *Id.*, 102.  
 Sandwich Islands, Oct. 29, 1857, " VI., 7 *Id.*, 322.

Treaty between the United States and

- Sweden, April 3, 1783, Art. VI., 8 *U. S. Stat. at L.*, 64.  
 San Salvador, Jan. 2, 1850, " XII., 10 *Id.*, 893.  
 Argentine Con- } July 27, 1853, " IX., 10 *Id.*, 1009.  
     federation, }  
 New Granada, Dec. 12, 1846, " XII., 9 *Id.*, 886.

Treaty between the United States and The Two Sicilies, Oct. 1, 1855, Art. VII., (11 *U. S. Stat. at L.*, 639,) provides, that as to any member of either nation dying within the jurisdiction of the other, his heirs, being citizens or subjects of the other, shall succeed as to the personalty, and either to the real estate, or to the proceeds thereof, whether by testament, or *ab intestato*.

And other American treaties, recognizing the disability as to real property, seem to secure the right to sell and take the proceeds

Many other treaties, which do not authorize aliens to inherit *real property*, provide that where the alien is, by the local law, incapable of succeeding to an inheritance, he may have a reasonable time to sell the estate.

Treaty between the United States and

- Hanover, June 10, 1846, Art. X., 9 *U. S. Stat. at L.*, 864.  
 Portugal, Aug. 26, 1840, " XII., 8 *Id.*, 560.  
 Russia, Dec., 1832, " X., 8 *Id.*, 444.

Others give the longest time therefor allowed by the local law.

Treaty between the United States and

- Nicaragua, June 21, 1867, Art. VIII., 15 *U. S. Stat. at L.*, (Tr.), 59.  
 Dominican Re- } Feb. 8, 1867, " V., 15 *Id.*, (Tr.), 167.  
     public, }  
 Bolivia, May 13, 1858, " XII., 12 *Id.*, 1010.  
 Venezuela, Aug. 27, 1860, " V., 12 *Id.*, 1146.  
 The Swiss Con- } Nov. 25, 1850, " V., 11 *Id.*, 590.  
     federation, }

Convention between the United States and

- Brunswick and Luneburg, Aug. 21, 1854, Art. II., 11 *U. S. Stat. at L.*, 601.

Three years is given by the treaty between France and

- Honduras, Feb. 22, 1856, 7 *De Clercq*, 10.

And between the United States and

- Guatemala, Mar. 3, 1849, Art. II., 10 *U. S. Stat. at L.*, 874.  
 Peru, July 26, 1851, " XV., 10 *Id.*, 932.  
 Ecuador, June 13, 1839, " XII., 8 *Id.*, 535.

Two years is given by the treaty between the United States and

Hesse Cassel, Mar. 26, 1844, Art. II., 9 *U. S. Stat. at L.*, 818.

Bavaria, Jan. 21, 1845, " II., 9 *Id.*, 827.

Saxony, May 14, 1844, " II., 9 *Id.*, 830.

Nassau, May 27, 1846, " II., 9 *Id.*, 850.

Independent of such treaties, the present rule is, that if, by the law of the *situs* of any immovables, any person has a capacity or incapacity, as from alienage, to take immovables, such capacity or incapacity will everywhere affect such person as to those immovables. *Story*, § 430. And the American authorities generally extend the same rule to disabilities from any cause. This is opposed by some jurists. See the Titles concerning the CONDITION OF PERSONS AND PROPERTY.

The existing disabilities of aliens are discussed in the pamphlet by *Sir A. Cockburn*, on *Nationality*, before referred to.

The desirableness of removing these disabilities, in respect to the tenure of real property, was distinctly recognized by the United States, in the treaty with France, Feb. 23, 1853, Art. VII., 10 *U. S. Stat. at L.*, 996.

The rule proposed removes the disabilities of aliens, in respect to property, only as between the nations uniting in the Code, and their members.

It has been well observed, that the dangers arising from allowing aliens to hold land, are not greater than those arising from allowing them to be fund-holders. *Transactions of National Association for Promotion of Social Science*, 1861, p. 787.

### *Foreigners enabled to transmit property.*

**335.** Title to and interest in property, movable or immovable, may be derived from and through foreigners, in the same manner and with the same effect as from and through members of the nation.

By some systems of law, an inheritance between citizens could not be traced through an alien.

### *Right to remove property.*

**336.** The movables of a foreigner may be freely removed by him from the territory of the nation, without hindrance or special imposts.

*Bluntschli*, *Droit Intern. Codifié*, § 393.

Treaty between the United States and Hanover, 1846, Art. X., 9 *U. S. Stat. at L.*, 864; and numerous other treaties. The time allowed for removal, in case of war, is the proper subject for regulation in the Book on WAR.

### *Absence of heirs.*

**337.** In defect of heirs, or in their absence from a

country, the property of a deceased foreigner is entitled to the same protection as if it were the property of a member of the nation, under the same circumstances.

This provision is in substance from the treaty between Great Britain and

Colombia, Feb. 16, 1866, *Accounts and Papers*, 1867, vol. LXXIV.

Madagascar, July 5, 1866, *Id.*, 1867, vol. LXXIV.

Italy, Aug. 6, 1863, *Id.*, 1864, vol. LXVI.

San Salvador, Oct. 24, 1862, *Id.*, 1863, vol. LXXV.

Nicaragua, Feb. 11, 1860, *Id.*, 1860, vol. LXVIII.

A number of French and American treaties, cited under the other articles, recognize the same principle.

*Death of persons who are foreigners, or not domiciled.*

**338.** In case of the death, within the territory of a nation, of any person not there domiciled, or of a foreigner of whatever domicile, or in case, on the death of such person or foreigner, without the territory of the nation, his body or movables are brought within its territory, the local authorities must notify the fact to the consul of the nation in which the deceased was domiciled and resident, within the district where the death or arrival takes place; or, if there be no such consul there, then to the nearest consul of such nation.<sup>1</sup>

If the deceased was a foreigner domiciled within the nation, then such notice must be given to the consul of the nation of which he was a member.<sup>2</sup>

If the consul first has knowledge of such a fact, he must notify it to the local authorities.

<sup>1</sup> This article is suggested by the consular conventions between France and Brazil, December 10, 1860, Art. VII., 8 *De Clercq*, 153, (interpreted by declaration of July 21, 1866, 9 *De Clercq*, 600;) between France and Portugal, July 11, 1866, Art. VIII., 9 *De Clercq*, 582; the convention between France and Austria, for the regulation of successions, December 11, 1866, Art. III., 9 *De Clercq*, 675; and the convention between the United States and Italy, February 8, 1868, Art. XVI., 15 *U. S. Stat. at L.*, (*Tr.*) 185. And brief provisions to somewhat the same effect as this and the following article, are contained in the treaty of friendship, commerce and navigation between France and Russia, June 14, 1857, Art. XX., 7 *De Clercq*, 278.

<sup>2</sup> If the domicile was foreign, the notice should be given to the consul

of the nation of such *domicil*; because the domicil will be the place of principal administration.

If the domicil be within the nation where the death occurred, the notice should be given to the consul of the nation of which the decedent was a *member*, because his heirs and next of kin are likely to be there, if not present at the place of domicil.

*Consul may send home assets of seamen, &c.*

**339.** If the deceased was a seaman on a private ship, or other inmate thereof except a passenger,<sup>1</sup> and his private property within the nation, including arrears of pay or other moneys due him, do not exceed five hundred dollars, all the property shall be delivered or paid to the consul, for the benefit of the persons interested.

This and the following provisions are designed to give the consul, in the absence of foreign heirs, &c., the right to administer in the local courts, according to the ordinary procedure, except in the cases of sailors, &c., where the assets are trifling in amount, in which cases the consul need not institute an administration, but may send the property home at once.

The existing rules are quite diverse. The consular convention between France and Portugal, July 11, 1866, Art. X., (9 *De Clercq*, 582,) provides that the consuls shall have exclusive charge of the inventory and other administrative acts for the preservation of the movable effects of every kind left by men of the sea and by passengers of their nation who die on land, or on board the ships of their country, whether on the voyage or at the port of destination.

By the English consular regulations, if a seaman dies on a voyage of a British vessel not homeward bound, the consul of a port at which it touches may collect the wages and take the other effects, to facilitate the settlement of the estate. *Instructions to Consuls*, 1856, p. 35, § 91.

This applies to all persons employed on merchant vessels, except the master. *Id.*, p. 37, § 99.

It is made the duty of consuls also to claim and receive, if possible, the effects of British seamen dying within the consulate, in whatever service they may have been engaged.

It is understood that an arrangement has recently been made between the North German Confederation and England, according to which the effects of a German sailor dying in a British ship, including the balance of his pay, should the entire value not exceed fifty pounds, will be delivered to the North German consul in London, while the property of British sailors dying on North German vessels will be placed in the hands of the English consul of the district in which the crew is discharged.

<sup>1</sup> There seems to be propriety in extending this provision to all cases mentioned in Article 337, where the assets are less than the specified sum, instead of restricting it to seamen.

By the treaty between the United States and The Two Sicilies, Oct. 1, 1855, Art. VII., (11 *U. S. Stat. at L.*, 639,) the consul is entitled to receive the effects of his countrymen without distinction, if formal opposition is not made by creditors, or, being made, is legally overruled.

*Consul entitled to administer.*

**340.** In cases other than those provided for in the last article, if the deceased leaves no executor, or person interested by succession or will, who, being competent, claims to administer, within the time limited by the law of the place, the consul, in preference to all other persons, shall be authorized by the local authorities to administer the assets, proceeding according to the local law,<sup>1</sup> but subject to the provisions of Division Second, on PRIVATE INTERNATIONAL LAW.<sup>2</sup>

<sup>1</sup> This is substantially the rule stated in the treaty between the United States and the Argentine Confederation, July 27, 1853, Art. IX., (10 *U. S. Stat. at L.*, 1009,) which provides, that if a citizen of one nation die intestate in the other, the consul of his nation may intervene in the possession, administration, and judicial liquidation of the estate, conformably to the laws of the country, for the benefit of creditors and heirs.

So by the consular convention between France and Brazil, December 10, 1860, Art. VII., (8 *De Clercq*, 153,) the right of administration upon the movables of a foreigner not domiciled in the country where the movables are, belongs to the consul of the nation to which the deceased appertained.

The administration and settlement of the succession of a Frenchman deceased in Brazil, is, according to that treaty, to be regulated in the following manner :

When a Frenchman deceased in Brazil leaves only Brazilian heirs, or when, together with French heirs who have attained majority, and who are present and capable, he leaves Brazilian heirs, minors, absent or incapable, the French consul shall not intervene.

When there shall be among the heirs of a Frenchman deceased in Brazil one or more French minors, absent or incapable, the consul shall have exclusive administration of the succession, if there is neither a widow of Brazilian origin, nor a Brazilian heir the head of a family, nor testamentary executor, nor Brazilian heirs who are minors, absent or incapable.

If there are at the same time one or more French heirs who are minors, absent or incapable, then, whether there be a widow of Brazilian origin,

or a Brazilian heir the head of a family, or testamentary executor, or one or more Brazilian heirs who are minors, absent or incapable, the French consul shall administer the succession conjointly with the Brazilian widow, or the chief of family, or the testamentary executor, or the representative of the Brazilian heirs.

It is understood that minor heirs, born in Brazil of French parents, are to be treated as having the status of their father until their majority. It is equally understood that *légataires universels* are treated as heirs.

Reciprocally, the succession of a Brazilian deceased in France will be administered and settled after the same rule, so far as not contrary to French law.

Other provisions regulate, in detail, the duties of a consular officer in carrying out the administration of these estates.

The treaty between the United States and Peru, July 26, 1851, Art. XXXIX., (10 *U. S. Stat. at L.*, 945,) makes the consuls, *ex officio*, the executors or administrators of their countrymen, in the absence of the legal heirs or representatives, but directs that if the deceased was engaged in trade, the assets shall be held twelve months, to allow creditors to present their claims.

By the treaty between the United States and Nicaragua, June 21, 1867, Art. VIII., (15 *U. S. Stat. at L.*, (*Tr.*) 59,) the minister or consul may nominate curators to take charge of the property of an intestate, so far as the local law will permit. See, also, the treaty with Paraguay, February 4, 1859, Art. X., 12 *U. S. Stat. at L.*, 1096.

The system adopted by the recent French treaties, [consular convention between France and Portugal, July 11, 1866, Art. VIII., (*De Clercq*, vol. 9, p. 582;) convention between France and Austria, for the regulation of successions, December 11, 1866, Art. III., (*De Clercq*, vol. 9, p. 675;) consular convention between France and Brazil, December 10, 1860, Art. VII., 8 *De Clercq*, 153,] involves a regulation of the proceedings in great detail.

The provisions of these treaties may be indicated together, as follows:  
The consul is authorized and required:

1. To seal up all the effects, movables and papers of the deceased, having given forty eight-hours' notice thereof to the competent local authorities, who are entitled to be present, if they so determine, to add their own seal to that which shall be affixed by the consul; and if this be done, the double seals shall not be broken except by the concurrence of both.

Whenever the local authorities are first informed of the death, and when according to the law of the country, they are bound to seal the effects of the deceased, they shall invite the consular officer to unite with them in this act.

In case an immediate sealing seems absolutely necessary, but this operation, by reason of the distance or other causes, cannot be done by both authorities in common, the local authorities or the consular officer, as the



case may be, may affix the seal, without awaiting the arrival of the other officer, and without prejudice to his right of subsequently affixing his seal.

2. To draw up, also, in presence of the competent local authorities, if they choose to be present, after such notice, an inventory of all the goods and chattels which were possessed by the decedent.

3. To cause the sale, by public auction, of all the movables constituting the inheritance of the decedent which are perishable, or subject to depreciation, and also of merchandise intended for sale, for the sale of which a favorable opportunity offers, giving first timely notice to the local authorities, to the end that the sale may be made in the form prescribed, and by competent agencies, according to the law of the country.

Where the local authorities cause such sale, they must give notice to the consular officer to be present.

4. To deposit in safe keeping the effects and valuables inventoried, to preserve the account of the debts which they collect, as well as the proceeds of the sales which they receive, in the consular office, or in some place of commercial deposit affording proper security.

In either case, such deposit must be made by agreement of the local authorities, called in to concur in the previous proceedings, if, by reason of the provision of the next subdivision, the inhabitants of the country or the members of a third nation claim to be interested in the estate, or, if required by the local authorities, for the security of any charges authorized by the laws of the country.

5. To announce the death, and to summon, by means of one or more of the public journals within their consular jurisdiction, and also, if necessary, journals of the country of the deceased, the creditors of the estate to present their respective claims, duly authenticated, within the time fixed by the laws of the respective countries.

If creditors of the estate present themselves, the payment of their demands ought to be accomplished in the space of fifteen days after the making of the inventory, if there be sufficient means ready, and applicable thereto; and if not, as soon as necessary funds can be realized by the most convenient means: or finally, within a day fixed by agreement between the consular officer and the majority of those interested.

6. In case of the insufficiency of the assets to satisfy the full payment of the debts proved, all the documents, effects, and other valuables belonging to the estate must, on the demand of the creditors, be surrendered to the competent judicial authorities of the place, or to a court of bankruptcy, according to the law of the country; in which case, the consular officer remains charged with representing the members and domiciled residents of his nation interested in the estate, who may be absent, minors, or otherwise incapable.

In any case, the consular officer cannot deliver the assets or their proceeds to the heirs or next of kin, or the beneficiaries under the will, until after having satisfied all the debts which the decedent may have contracted in the country.

7. To administer and settle, either by themselves, or by a person appointed by them, and acting under their responsibility, the goods and chattels of the estate, if the period fixed by the local authorities, according to the laws of the country, for its own members, or those of a third nation, domiciled in the country, to present their demands, is not expired, and if there be no dispute as to such demands; but in either such case, the consular officer must relinquish the settlement of the estate to the proper legal authorities, and limit his interference to those administrative measures which will not involve these questions, leaving the decision of such questions, so far as they do not depend upon the title to the succession or the distribution, under the will, to the exclusive control of the courts and tribunals of the country.

Having in such cases relinquished the administration to the local authorities, the consular officer continues to be the representative of the succession and the beneficiaries under the will, for the purpose of protecting the rights of the parties interested, and has power, if necessary, to employ counsel for the protection of those rights.

After the judgment has been pronounced upon the demands so reserved to the decision of the tribunals of the country, or after the sum required for their payment has been determined, the entire movable assets, except those which may be necessary to remain as security, shall be, after the removal of the seals imposed by the local authorities, delivered for its final disposal to the consular officer.

8. To procure his own appointment, if that be necessary, as administrator, or as administrator with the will annexed, if an executor has been named, but has declined the trust, or is unknown, absent, or incapable.

<sup>2</sup> If the deceased was domiciled in another nation, the administration will be ancillary to any administration instituted at home. If he was a foreigner domiciled at the place of his death, the administration will be the principal one. In either case, the consul's proceedings should be, in other respects, according to the local law, and under the authorization of the court of probate.

### *Security not required.*

**341.** A consul entitled to administration under the last article, shall not be required to give security for the performance of his duties.

Inasmuch as he only intervenes for the interest of his countrymen, his official responsibility should seem enough.

### *Local authorities to administer in absence of consul and all other authorized persons.*

**342.** In the absence of the consul and secretary of legation, and of all other representatives in interest of the foreign parties, the local authorities shall administer the estate without unnecessary delay or expense.

and shall render account thereof to the nearest consul or to the secretary of legation of the nation of the foreigners entitled, and shall deliver and pay to him that which belongs to such members of his nation as do not appear to claim the same.

Suggested by the consular convention between France and Portugal, July 11, 1866, Art. VIII., (9 *De Clercq*, 582,) and the convention between France and Austria, for the regulation of successions, December 11, 1866, Art. III., (9 *De Clercq*, 675,) which also provide that if in such case the nearest consular officer appears, either in person or by delegate, in the place of administration, the local authorities who have intervened must comply with the requirements giving him the right to act.

By the treaty between France and Peru, March 9, 1861, Art. XXXVII., subd. 5, (8 *De Clercq*, 193,) the payment of the assets to the consul is without prejudice to the rights of creditors subsequently presenting themselves within the time prescribed by the statute of limitations of the country to which the decedent belonged.

*Notice to be given of successions in which foreigners are interested.*

**343.** If a foreigner, absent or incompetent, is interested, by succession or will, in the property, movable or immovable, of any deceased person whomsoever, which is subject to the administration of a nation, the local authorities must notify the existence of the property to the nearest consul of the nation of the foreigner interested, and render account of the administration thereof, as prescribed in the last article.

Suggested by the convention between France and Austria, for the regulation of successions, Dec. 11, 1866, Art. III., 9 *De Clercq*, 675.

The treaty between the United States and The Two Sicilies, Oct. 1, 1855, Art. VII., (11 *U. S. Stat. at L.*, 639,) provides, that in the absence of the heir entitled to succeed under the treaty, or his representatives, the consul shall have notice from the judicial authorities of the time of imposing or removing the seals, and making this inventory, and may assist thereat.

*Secretary of legation to act if there be no consul.*

**344.** If there be no consul of the proper nation, who can act under the provisions of this Chapter, the secretary of legation of the same nation shall receive the notice and exercise the powers herein prescribed for consuls.

## CHAPTER XXVII.

## WRECKES.

Other treaties, containing similar provisions to those cited below, will be found. See 7 *De Clercq*, 10, 362, 586 ; 8 *Id.*, 193 ; 10 *U. S. Stat. at L.*, 87, Art. X.; (Tr.), 71, Art. XI., 9 *Id.*, 55, Art. IV.; 67, Art. IV.; 79 Art. XI.; 8 *Id.*, 560, 534, Art. XI. ; British *Accounts and Papers*, 1866, vol. LXXVI., (38.) See, also, *United States Consular Regulations*, (1870,) ¶¶ 209-218, and Treaties in Appendix.

- ARTICLE 345. Duty of a nation to succor and protect.  
 346. Notice of wreck to consul of the ship's nation.  
 347. Power of consul or local authorities over wrecks.  
 348. Interference of local authorities restricted.  
 349. Property exempt from duties.  
 350. Local charges restricted.  
 351. Authorizing sale of wrecked property.  
 352. Ancient rule of wreck abolished.  
 353. Property to be restored to owner.  
 354. Duty of nation to provide for care of wrecked property.  
 355. Official sales.

*Duty of a nation to succor and protect.*

**345.** It is the duty of every nation to receive and protect foreigners, members of any nation whatever, and foreign ships,<sup>1</sup> public or private, wrecked or damaged on its coasts, or within its jurisdiction, or seeking refuge there from distress or perils of the sea, and allow them freely to prepare for and continue their voyages. Such ships, and the persons and property therein, must receive the same succor, and be subject to the same charges, salvage, or other burdens as domestic ships in like cases.<sup>2</sup>

This article and the next are in substance from the treaties between the United States and

Hayti,	Nov. 3, 1864, Art.	XV., 13 <i>U. S. Stat. at L.</i> , 711.
Bolivia,	May 13, 1858, "	IX., 12 <i>Id.</i> , 1009.
Venezuela,	Aug. 27, 1860, "	XI., 12 <i>Id.</i> , 1149.
Netherlands,	Oct. 8, 1782, "	XVII., 8 <i>Id.</i> , 42.
Sweden,	April 3, 1783, "	XXI., 8 <i>Id.</i> , 72.
Prussia,	1785, "	IX., 8 <i>Id.</i> , 84.
Morocco,	Jan. 1787, "	X., 8 <i>Id.</i> , 100.
Nicaragua,	June 21, 1867, "	XIII., 15 <i>Id.</i> , 67.
Guatemala,	Mar. 3, 1849, "	VIII., 10 <i>Id.</i> , 876.
Peru,	July 26, 1851, "	XVII., 10 <i>Id.</i> , 933.

Similar provisions are contained in the treaty between France and Honduras, February 22, 1856, Art. XII., (7 *De Clercq*, 10.) See, also, treaty between France and Nicaragua, April 11, 1859, Art. XII., (7 *Id.*, 586.)

<sup>1</sup> These provisions have been extended to ships of whatever nationality, because it is the interest of each nation that their members should be succored in distress, without reference to the nationality of the ship.

<sup>2</sup> Provisions exempting ships of either nation on the coasts of the other, or driven into ports of distress, from all charges except these of pilotage, light-house dues, and others representing the compensation of private industry, provided that the vessels do not lade or unlade cargo, are contained in the treaty between France and San Salvador, Jan. 2, 1858, Art. XIV., 7 *De Clercq*, 362.

Somewhat similar provisions as to freedom from charges are contained in the treaty between France and New Granada, May 15, 1856, Art. XV., 7 *De Clercq*, 102.

A declaration relative to the treatment of ships driven into ports of distress, made between France and Hanover, April 10, 1856, (7 *De Clercq*, 86,) provides, that such ships shall be exempt from dues of the port or of navigation, if the necessity is real and evident, and if the ship does no business—discharge of cargo merely for the purpose of repairs, not being considered as such—and provided that the ship does not unnecessarily prolong its stay.

Upon the same conditions, the treaty between the United States and The Two Sicilies, October 1, 1855, Art. XVI., (11 *U. S. Stat. at L.*, 639,) secures to foreign ships the same treatment as domestic ships.

The doctrine is supported also by the opinion of the United States Attorney-General, in the case of *The Creole*, 4 *Opinions of U. S. Attorneys-General*, p. 98; also, in *Cases and Opinions of Constitutional Law*, by Forsyth, p. 400, in which he says: The principle is, that if a vessel be driven by stress of weather, or forced by *vis major*, or in short, be compelled by any overruling necessity to take refuge in the ports of another, she is not considered as subject to the municipal law of that other, so far as concerns any penalty, prohibition, tax, or incapacity that would otherwise be incurred by entering the ports, provided she do nothing further to violate the municipal law during her stay.

*Notice of wreck to consul of the ship's nation.*

**346.** In case of the wreck, stranding, or distress of a foreign ship, public or private, on the coasts of any nation, or on navigable waters within its jurisdiction, if the nationality of the ship be known, the local authorities must immediately notify the fact to the consul of the nation to which the ship or wreck belongs, resident within the district; or if there be none, then to the nearest consul; or, if none, to the secretary of legation of such nation, who, in the absence of the consul, shall have the powers conferred on consuls by this Chapter.

This and the three following articles are suggested by the convention between the United States and

Italy, Feb. 8, 1868, Art. XV., 15 *U. S. Stat. at L.*, (Tr.), 185.

France, Feb. 23, 1853, " XI., 10 *Id.*, 998.

Treaty of navigation between France and

Sweden and Norway, Feb. 14, 1865, 9 *De Clercq*, 172.

Treaty of commerce and navigation between France and

The Free Cities of Lu- beck, Bremen, and Ham- burg,	} Mar. 4, 1865, Art. XXI., 9 <i>De Clercq</i> , 187.
Grand Duchy of Meck- lenburg-Schwerin— (extended to the) Grand Duchy of Mecklenburg- Strelitz,	

Netherlands,	} June 9, 1865, " XVII., 9 <i>Id.</i> , 295.

	July 7, 1865, " XXXVII., 9 <i>Id.</i> , 337.
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*Power of consul or local authorities over wrecks.*

**347.** The consul of the nation to which the ship belongs,<sup>1</sup> and in his absence and until his arrival, the local authorities may, for the purpose of saving the ship, and the persons and property on board, take possession of it, and, if it be a private ship, may for the same purpose take command over the master, or other person having charge thereof.

Suggested by the British Merchant Shipping Act, 17 & 18 *Vict.*, c. 104, Part VIII., qualified by giving the consul the prior right.

<sup>1</sup> The consular convention between France and Portugal, July 11, 1866, Art. XIV., (9 *De Clercq*, 502,) which contains the same provision, adds that in case of doubt respecting the nationality of the ship, the care of the wreck is subject to the exclusive direction of the local authorities.

*Interference of local authorities restricted.*

**348.** When the consul acts in the cases mentioned in the last article, the local authorities shall not otherwise interfere than for the maintenance of order, the protection of the interests of the salvors, not belonging to the crew, and to carry into effect the rules applicable to the entry and exportation of property saved.

*Property exempt from duties.*

**349.** Property saved, or landed to facilitate repairs, is not subject to duty or custom-house charges, unless admitted or intended for consumption within the jurisdiction of the nation.

In some of the treaties cargo landed to facilitate repairs is to be subject to the same charges as are payable by members of the nation in respect of its domestic vessels in like cases.

*Local charges restricted.*

**350.** The intervention of the local authorities, when permitted under this Chapter, cannot give rise to expenses other than those which the operations of quarantine,<sup>1</sup> salvage, and the preservation of the object saved, occasion, and such as would be imposed, in the case of domestic ships, under like circumstances.

Consular convention between France and

Austria, Dec. 11, 1866, Art. XIV., 9 *De Clercq*, 669.

Treaty between the United States and

Peru, July 26, 1851, Art. XVI., 10 *U. S. Stat. at L.*, 933.

<sup>1</sup> Treaty between the United States and

The Two Sicilies, Oct. 1, 1855, Art. XVII., 11 *U. S. Stat. at L.*, 639

*Authorizing sale of wrecked property.*

**351.** In cases of necessity, in the absence of the owner or his agent, and inability reasonably to communicate with him, the consul may authorize the repair or sale<sup>1</sup> of wrecked or damaged property, with the sanction of the proper judicial authorities of the country, but not otherwise.<sup>2</sup>

<sup>1</sup> In reference to the sale, in a foreign country, of a ship belonging to a member of the consul's nation, the consul acts for the purpose of subsequently affording the relief granted by law and for the purpose of secur

ing the payment of any extra wages to seamen, required by the law of his nation. *United States Consular Regulations*, (1870,) ¶¶ 131, 132.

<sup>4</sup> *Bluntschli, Droit Intern. Codifié*, § 264, does not recognize such a restriction as this.

Perhaps, however, this power should be further restricted. Compare the terms of Article 390.

*Ancient rule of wreck abolished.*

**352.** Any property cast by the sea upon the land,<sup>1</sup> or floating, or sunken<sup>2</sup> in the navigable waters within the jurisdiction<sup>3</sup> of any nation, unless voluntarily or freely<sup>4</sup> abandoned by the owner, without intention of recovering it,<sup>5</sup> may be reclaimed by him, or on his behalf, at any time before it has been otherwise disposed of, pursuant to the provisions of this Chapter.

<sup>1</sup> 2 *Kent's Commentaries*, 321.

<sup>2</sup> A canal boat sunk in a navigable river, was held not to be "wrecked property," within the New York statute concerning Wrecked Property, (1 *Rev. Stat.*, 690,) which only mentioned things cast by the sea upon the land. *Baker v. Hoag*, 7 *New York* (3 *Selden*) *Rep.*, 555; overruling *S. C.*, 3 *Barbour's Rep.*, 203; and 7 *Id.*, 113.

<sup>3</sup> The provisions of the New York statute have been recently extended to things cast by any inland lake or river on the land. 1 *N. Y. Laws of* 1869, 1187, ch. 493.

<sup>4</sup> The abandonment will not divest the owner of his right, unless it was freely as well as voluntarily made. A voluntary abandonment, under the constraint of danger or distress, may mark the property as derelict, and entitle salvors to peculiar compensation, but does not preclude his claim. *Abbott's U. S. Courts*, vol. 1, 574.

<sup>5</sup> The intent to abandon may be inferred from a great lapse of time, *Bouvier's Dictionary*, Tit. "Derelicts."

*Property to be restored to owner.*

**353.** The property mentioned in this Chapter must be delivered when recovered,<sup>1</sup> or, if sold, the proceeds thereof must be paid to the consul of the owner's nation,<sup>2</sup> on claim being made within one year.<sup>3</sup>

<sup>1</sup> Treaty between the United States and Peru, July 26, 1851, Art. XVI, 10 *U. S. Stat. at L.*, 933.

<sup>2</sup> Treaty between the United States and The Two Sicilies, Oct. 1, 1855, Art. XVII, 11 *U. S. Stat. at L.*, 639.

<sup>3</sup> A year (and a day) is fixed by several treaties. 8 *U. S. Stat. at L.*, 42, 72.



*Duty of nation to provide for care of wrecked property.*

**354.** It is the duty of every nation to provide by law for the protection and restoration of wrecked property and for the redress or punishment of any violation of the rights of owners in respect thereto.

The provisions of the English law on this subject are in 17 & 18 *Vict.* c. 104, Part VIII.

Those in the State of New York are in the *Revised Statutes*, vol. 1, p. 690.

The essential points covered by these provisions may be briefly stated as follows:

1. Persons having wrecked property, who do not deliver it to the owner, or the proper officer, or who deface marks thereon, or disguise its appearance, with intent to conceal its identity, or who deface, destroy or suppress any document affecting the ownership; and officers and agents of the government of the place, who detain any wrecked property, or its proceeds, after the expenses and salvage have been ascertained and tendered, or who are guilty of fraud, embezzlement, or extortion in reference thereto, are punishable criminally, and liable to an action by the person wronged.

2. By the English law, plundering and damaging wrecks is to be compensated for by the inhabitants of the district. 17 & 18 *Vict.*, c. 104, § 477.

3. Wrecked property, which is of a perishable nature, or which has been kept one year without being claimed, may be sold under the authority of the State, and the proceeds, after paying expenses and salvage, if not claimed within one year after the sale, shall accrue to the treasury of the State, or to the persons who by the local law are entitled to wreck found at the place in question.

*Official sales.*

**355.** A sale of wrecked property by or under the sanction of the local authorities, pursuant to law, transfers the title absolutely to a purchaser in good faith.

1 *Parsons on Shipping & Adm.*, 78, and note.

By the treaty between the United States and The Two Sicilies, above referred to, claims upon the property are to be determined by the local tribunals.

## TITLE X.

## DUTIES OF FOREIGNERS TO THE NATION.

CHAPTER XXVIII. Subjection to the laws.

XXIX. Civil and military service.

XXXX. Taxation.

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CHAPTER XXVIII.

## SUBJECTION TO THE LAWS.

ARTICLE 356. Subjection to the laws.

*Subjection to the laws.*

**356.** Except as otherwise provided by this Code, or by special compact, foreigners are subject to the constitution and laws of the country wherein they are, for the time being.

*Bluntschli (Droit Int. Codifié, § 388,)* in stating this rule, adds, that allowance ought to be made for the fact that strangers do not understand the laws as well as citizens.

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CHAPTER XXIX.

## CIVIL AND MILITARY SERVICE.

ARTICLE 357. Civil service.

358. Military service.

*Civil service.*

**357.** Foreigners are exempt from all official functions.

## Treaty between Great Britain and

Colombia, Feb. 16, 1866, Art. XVI., { *Accounts and Papers*, 1867,  
vol. LXXIV., (36.)  
Italy, Aug. 6, 1863, " XV., *Id.*, 1864, vol. LXVI., (35.)

## Treaty between France and

The Free Cities of Lu- }  
beck, Bremen & Ham- } Mar. 4, 1865, Art. II., 9 *De Olercq*, 189.  
burg, }  
Grand Duchies of Meck- }  
lenburg-Schwerin and } June 9, 1865, " II., 9 *Id.*, 295.  
Strelitz, }  
Russia, June 14, 1857, " I., 7 *Id.*, 278.

The English Judicature Commission (Report of 1869,) recommend that aliens having been resident ten years shall, if qualified, be liable to do jury duty.

*Military service.*

**358.** Foreigners are exempt from military and naval service, except in the case of necessity for the purpose of defending the place where they are from brigands or savages.

*Bluntschli, Droit. Intern. Codifié*, § 391.

Freedom of foreigners from compulsory military and naval service is recognized by the treaties between the United States and

Nicaragua, June 21, 1867, Art. IX., 15 *U.S. Stat. at L.*, (*Tr.*), 59.  
Dominican Republic, Feb. 8, 1867, " II., 15 *Id.*, (*Tr.*), 167.  
Paraguay, Feb. 4, 1859, " XI., 12 *Id.*, 1096.  
Venezuela, Aug. 27, 1860, " II., 12 *Id.*, 1144.  
Two Sicilies, Oct. 1, 1855, " V., 11 *Id.*, 639.

## Treaties between France and

Russia, June 14, 1857, Art. II., 7 *De Olercq*, 278.  
Nicaragua, April 11, 1859, " IV., 7 *Id.*, 586.  
Swiss Confederation, June 30, 1864, " IV., 9 *Id.*, 91.  
(Extended to the) French }  
Colonies, } 9 *Id.*, 372.  
Grand Duchy of Meck- }  
lenburg-Schwerin (ex- }  
tended to the) Grand } June 9, 1865, " II., 9 *Id.*, 295.  
Duchy of Mecklen- }  
burg-Strelitz, }  
The Free Cities of Lubeck, }  
Bremen and Hamburg, } March 4, 1865, " II., 9 *Id.*, 187.

By the treaty between the United States and the Swiss Confederation, Nov. 25, 1850, Art. II., (11 *U. S. Stat. at L.*, 587,) the members of either nation residing in the other are free from personal military service, but are liable to the pecuniary or material contributions chargeable on exempt citizens.

*Heffter, Droit International*, § 62, p. 125. *Papers Relating to Foreign*

*Affairs*, 1862, p. 282. Mr. Stuart to Mr. Lenard, Sept. 6, 1862: "The ordinary claim for exemption of alien residents from military service does not extend to service in the local police when imposed by the municipal law, or in companies formed exclusively for the maintenance of internal peace and order and for the protection of property."

## CHAPTER XXX.

### TAXATION.

#### ARTICLE 359. Jurisdiction to tax.

360. Taxes on the person.

361. Equality of taxes

362. Corporations.

363. Shipping.

364. Property in transit.

365. Debts, and evidences of debt.

366. Commercial paper.

367. No nation to tax national obligations of another.

#### *Jurisdiction to tax.*

**359.** Subject to the provisions of this Chapter, each nation has exclusive power to impose taxes:

1. Upon all property within its jurisdiction, whether movable or immovable;<sup>1</sup>

2. Upon all property of its domiciled residents, and of corporations existing by virtue of its laws, which is not within another jurisdiction; and,

3. Upon the exercise of any vocation within its jurisdiction.

<sup>1</sup> Taxes are a portion that each individual gives of his property in order to secure the perfect enjoyment of the remainder; and the owner of property within the limits of any State, no matter whether it be real or personal, and no matter where he has his domicile, since he is entitled in respect to it to the protection of the State, is liable to taxes levied by such State. *Duer v. Small*, 7 *American Law Register*, 500; and see *Bluntschli, Droit Intern. Codifié*, § 377.

There are authorities, however, to the contrary, on the ground that double taxation, which this rule allows, is inequitable. *People ex rel. Hoyt v. Commissioners of Taxes*, 23 *New York Rep.*, 224. And see Report of *Wells* and others, Commissioners on local taxation in New York, (Harper's ed.,) pp. 43, 44, 45.

*Taxes on the person.*

**360.** Taxes in respect to the person can only be imposed by the nation in which the person is domiciled.

*Bluntschli*, (*Dr. Int. Cod.*, § 376,) qualifies this by adding that the country of origin may levy certain taxes on its own members domiciled abroad, (for example, taxes for the assistance of the poor,) but that the State of the domicil is under no obligation in reference to the collection thereof.

*Equality of taxes.*

**361.** No other or more burdensome taxes can be imposed upon foreigners, whether in respect to person, property, or vocation, than on the members of the nation.

Equality of taxes is secured by a number of treaties. See

Treaty between France and

Russia, June 14, 1857, Art. I., 7 *De Clereq.*, 278.

Peru, March 9, 1861, . " III., 8 *Id.*, 196.

Nicaragua, April 11, 1859, " IV., 7 *Id.*, 586.

Treaty between the United States and

Nicaragua, June 21, 1867, Art. IX., 15 *U. S. Stat. at L.*, (*Tr.*) 59.

*Bluntschli*, in stating the rule on this point, qualifies it by adding that the State may demand a sum in payment for the privilege of sojourning in the country. Treaty provisions forbidding such burdens are now so common that it should seem advisable to discard that right.

This rule, perhaps, should be qualified by excepting foreign corporations, which it is usual, in some countries, to tax more heavily than domestic corporations.

*Corporations.*

**362.** The interests of owners of shares in the capital of a corporation are taxable as the personal property of such owners.

By the American law, the property of the corporation is distinguished from the interests of its shareholders, for the purposes of taxation, as well as for other purposes.

A State has no power to tax the interest of bonds, (secured in this case by mortgage,) given by a railway corporation, and binding every part of the road, when the road lies partially in another State; being one road owned by a company incorporated by the two States. The effect of allowing such tax would be to enable each State to tax property beyond its own limits. *Railroad Company v. Jackson*, 7 *Wallace's U. S. Supreme Court Rep.*, 262.

Upon considerations somewhat similar to those referred to, it may be suggested that shares in a corporation, as distinguished from the property of the corporation, should not be taxable.

### *Shipping.*

**363.** Shipping is taxable only by the nation whose character it bears.

This is the rule laid down in *Hays v. Pacific Mail Steamship Co.*, 17 *Howard's U. S. Sup. Ct. Rep.*, 596, as applicable at least so long as the vessel gains no *situs* in the foreign State.

See also *People ex rel. Hoyt v. Commissioners of Taxes*, 23 *New York Rep.*, 240; and Report of *Wells* and others, Commissioners on *Local Taxation*. Harper's ed., p. 45.

### *Property in transit.*

**364.** Property of a foreigner, in transit between different jurisdictions, whether actually in motion or awaiting directions or means of transportation, is only taxable under ordinary revenue laws applicable to importation or exportation.

This rule appears to be generally recognized. The power to tax property sent into a State, and lying there awaiting sale, seems clear, although the policy of it is questioned. Report of *Wells*, and others, Commissioners, on *Local Taxation*, Harper's ed., p. 45. The treaty between the United States and Belgium, 1858, Arts. XII. and XVI., (12 *U. S. Stat. at L.*, 1046,) provides that during the period allowed by law for the warehousing of goods, no duties, other than those of watch and storage, shall be levied on articles brought from either country into the other, while awaiting transit, re-exportation, or entry for consumption.

And articles, the transit of which is allowed in Belgium, are exempt from transit duty there, when transportation is effected on Belgian railways.

### *Debts and evidences of debt.*

**365.** Debts, and the evidences thereof, due from domiciled residents of a nation to another nation, or domiciled residents therein, are not taxable in either.

Sound political economy forbids the taxation of evidences of debt. (See Report of *Wells*, and others, Com'rs, on *Local Taxation*, Harper's ed., p. 45. They are instruments of commerce. The systems of England and France are understood to recognize this principle.

It is for each nation to adopt such a rule or not, for its own members; but in an international point of view, it is suggested that this rule should be observed. It leaves all tangible property to be taxed according to the previous rule.

*Commercial paper.*

**366.** Negotiable instruments made in one country, to be negotiated or paid in another, are not taxable, except by stamp duties in the nation where made,<sup>1</sup> and that where transferred.

<sup>1</sup> This rule is new.

A tax on the business of a dealer in exchange is not a tax on bills or commerce. *Nathan v. Louisiana*, 8 *Howard's U. S. Sup. Ct. Rep.*, 73. By the English law, foreign bills are liable to stamp duty, when paid, indorsed, transferred, or otherwise negotiated within the United Kingdom. *Griffin v. Weatherby*, *Law Rep.*, 3 *Queen's Bench*, 753.

*No nation to tax national obligations of another.*

**367.** No nation can tax the national obligations of another ; nor its own obligations, except in the hands of its own members.

This rule is suggested as founded in comity, and one that will, on the whole, be equal and just in its operation.

The report of *Wells*, and others, Com'rs, on *Local Taxation*, (Harper's ed., p. 66,) states that, "England, Austria and Italy tax the non-resident holders of their national debts at the place where the debt is held to have been created or is now inscribed."

## PART III.

UNIFORM REGULATIONS FOR MUTUAL  
CONVENIENCE.

- TITLE** XI. SHIPPING.  
XII. IMPOSTS.  
XIII. QUARANTINE.  
XIV. RAILWAYS.  
XV. TELEGRAPHS.  
XVI. POSTAL SERVICE.  
XVII. PATENTS.  
XVIII. TRADE MARKS.  
XIX. COPYRIGHTS.  
XX. MONEY.  
XXI. WEIGHTS AND MEASURES.  
XXII. LONGITUDE AND TIME.  
XXIII. SEA SIGNALS.  
XXIV. BILLS OF EXCHANGE.
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**COMMERCIAL REGULATIONS.**—A number of provisions affecting commerce are contained in the preceding Chapters of this Book, particularly in Chapter VI., on NAVIGATION ; in Chapter IX., concerning FISHERIES ; in Chapter XVIII., Section II., entitled the EXTRADITION OF DESERTERS, and in Titles IX. and X., relating to the DUTIES OF A NATION TO FOREIGNERS, and the DUTIES OF FOREIGNERS TO THE NATION.

Those provisions are there placed, because they define what are regarded as the intrinsic rights of nations, or are proposed as modifying the absolute rights there stated.

The provisions of this Part, although to some extent cognate to those above referred to, have an independent character, as a system of regulations founded not so much on questions of right and obligation, as on the convenience of having uniform rules for the facilitation of commercial and social intercourse ; and they are, therefore, presented here, in connection with others originating in the same general purpose.

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## TITLE XI.

## SHIPPING.

- CHAPTER XXXI. General provisions.  
XXXII. Rules of navigation, [law of the road at sea.]  
XXXIII. Collision.  
XXXIV. Average.  
XXXV. Salvage.
- 

## CHAPTER XXXI.

## GENERAL PROVISIONS.

- ARTICLE 368. Definition of "ship."  
369. "Appurtenances" defined.  
370. Employment of ships.  
371. Foreign navigation.  
372. Domestic navigation.  
373. Foreign and domestic ships distinguished.  
374. Owner for the voyage.  
375. Registry, enrollment and license.  
376. Value of ship.  
376a. Responsibility, if death ensue from shipwreck.  
376b. Presumption of negligence.

*Definition of "ship."*

**368.** The term "ship," as used in this Code, signifies any structure fitted for navigation. Every kind of ship is included in the term "shipping."

*"Appurtenances" defined.*

**369.** The term "appurtenances," as used in this Code, in respect of a ship, includes all things belonging to the owners, which are on board of the ship, or attached to it, and are connected with its proper use for the objects of the voyage and adventure in which the ship is engaged.

See 1 *Parsons' Maritime Law*, 71.

*Employment of ships.*

**370.** Ships are engaged either in foreign or domestic navigation, or in the fisheries.

*Foreign navigation.*

**371.** Ships are engaged in foreign navigation, when passing to or from a foreign country, or in any service connected therewith.

*Domestic navigation.*

**372.** Ships are engaged in domestic navigation, when passing, for carriage or traffic, between places within the same nation, or in any service within the nation, connected therewith.<sup>1</sup>

Receiving or discharging part of a foreign cargo, or of foreign passengers, at one port, and another part of the same at another port, is not domestic navigation, as here defined.<sup>2</sup>

<sup>1</sup> This will include both the coasting trade and internal navigation.

By the treaty between the United States and the Netherlands, Aug. 26, 1852, Art. IV., (10 *U. S. Stat. at Large*, 984,) the trade from island to island in the Eastern Archipelago, and from Atlantic to Pacific ports in the United States, is considered as coasting trade.

<sup>2</sup> Convention between the United States and

Dominican } Feb. 8, 1867, Art. VII., 15 *U. S. Stat. at L.*, (Tr.), 167.  
Republic, }

Treaty between the United States and

Bolivia, May 13, 1858, Art. III., 12 *U. S. Stat. at L.*, 1004.

Venezuela, Aug. 27, 1860, " VII., 12 *Id.*, 1147.

Two Sicilies, Oct. 1, 1855, " XIII., 11 *Id.*, 647.

Netherlands, Aug. 26, 1852, " IV., 10 *Id.*, 984.

*Foreign and domestic ships distinguished.*

**373.** A ship, when within the limits of its own nation, is called a domestic ship; within the limits of another nation, it is called a foreign ship.

In the United States, a ship is called domestic or foreign in any State, according as it belongs to that State, or any other. In this Code, these words depend on nationality.

*Owner for the voyage.*

**374.** If the owner of a ship commits its possession and navigation to another, that other, and not the owner, is responsible for its repairs and supplies.

<sup>1</sup> As a general rule, the party that mans the vessel is considered as in possession. *Palmer v. Gracie*, 4 *Washington's U. S. Circ. Ct. Rep.*, 110; *Marcadier v. Chesapeake Ins. Co.*, 8 *Cranch's U. S. Sup. Ct. Rep.*, 39; *The Sch. Volunteer*, 1 *Sumner's U. S. Circ. Ct. Rep.*, 551; *Logs of Mahogany*, 2 *Id.*, 589,

*Registry, enrollment, and license.*

**375.** The registry, enrollment, and license of ships are regulated, in each nation, by its own laws. The national character of shipping is defined by Chapter XX.

3 *Kent's Commen.*, 133; *Hesketh v. Stevens*, 7 *Barbour's (N. Y.) Rep.*, 488.

*Value of ship.*

**376.** The value of a ship, when not fixed or ascertained by agreement of the parties, is her value for sale at the port to which she belongs, less the expense of returning her there, including insurance.

For a discussion as to the tests of value of a ship, see *Transactions of National Association for Promotion of Social Science*, 1863, p. 875.

**376a.** In every case of shipwreck, by collision or other cause, if death is the result, the legal representative of the person deceased shall be entitled to compensation for all losses occasioned by such death.

Conformable to late statutes in America and England.

**376b.** In every case of shipwreck, from any cause other than collision, the owner of the ship shall be presumed in fault, and held liable to all persons aggrieved, for any loss thereby; but such presumption may be rebutted by proof, that so far as he had the means of knowing or controlling the construction, equipment or navigation of the ship, he had used due diligence to guard against the disaster.

New.

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## CHAPTER XXXII.

### RULES OF NAVIGATION, [LAW OF THE ROAD AT SEA.]

The provisions of this Chapter are those issued in pursuance of the *British Merchant Shipping Act*, 1862, Table c, § 25, made applicable, by consent of the nations, to the ships of the following countries, whether within British jurisdiction or not. *British Order in Council*, July 30, 1868.

Austria.  
Argentine Republic.  
Belgium.  
Brazil.  
Bremen.

Chili.  
Denmark Proper.  
Equator, Republic of the.  
France.  
Great Britain.

Greece.  
Hamburg.  
Hanover.  
Hawaiian Islands.  
Hayti.

Italy.	Peru.	Sweden.
Lubeck.	Portugal.	Turkey.
Mecklenburg-Schwerin.	Prussia.	United States, sea-going ships.
Morocco.	Roman States.	United States, inland waters.
Netherlands.	Russia.	Uruguay.
Norway.	Schleswig.	
Oldenburg.	Spain.	

**ARTICLE 377. Law of the road at sea.**

Rule 1. Steam and sail.

2. Night-lights.
3. Lights for sea-going steamships.
4. Lights for steam-tugs.
5. Lights for sailing ships
6. Exceptional lights for small sailing ships.
7. Lights for ships at anchor.
8. Lights for pilot vessels.
9. Lights for fishing vessels and boats.
10. Fog-signals.
11. Two sailing ships, or two ships under steam, meeting.
12. Two sailing ships crossing.
14. Two ships under steam crossing.
15. Sailing ship and ship under steam.
16. Ships under steam to slacken speed.
17. Ships overtaking other ships.
18. Construction of preceding rules.
19. Proviso to save special cases.
20. No ship under any circumstances to neglect proper precautions.

**378. Duty of succor.**

*Law of the road at sea.*

**377.** The following rules of navigation constitute the law of the road at sea :

In addition to which, all rules concerning the lights or signals to be carried by ships navigating the waters of any harbor, river, or other inland water, or concerning the measures for avoiding collision, to be taken by such ships, which have been, or may hereafter be, made by or under the authority of any local law, shall be and continue of full force and effect in respect to domestic ships in all cases, and in respect to foreign ships having notice of such rules ; but foreign ships, which are not shown to have had notice thereof, are not bound thereby.

*Merchant Shipping Act* of 1854, § 31; modified by inserting the exemption of foreign ships without notice.

The local regulations of a harbor have been held by the American courts not to be applicable in questions of collision, as against foreign ships engaged in general commerce. Such a ship carrying the light required by the admiralty rules, is not in fault for not showing a different one required by local law. *The New York v. Rea*, 18 *Howard's U. S. Sup. Ct. Rep.*, 223; *Snow v. Hill*, 20 *Id.*, 543. But see, also, *The James Gray v. The John Frazer*, 21 *Id.*, 184; *The E. C. Scranton*, 3 *Blatchford's U. S. Circ. Ct. Rep.*, 50; *Smith v. Condry*, 1 *Howard's U. S. Sup. Ct. Rep.*, 28. And compare Article 60, concerning restrictions on the right of navigation.

### *Steam and sail.*

Rule 1. In the following rules, every steamer which is under sail and not under steam, is to be considered a sailing ship; and every steamer, which is under steam, whether under sail or not, is to be considered a ship under steam.

Article 1 of *British Regulations*, 1868.

### *Night lights.*

Rule 2. The lights mentioned in the following rules, numbered 3, 4, 5, 6, 7, 8 and 9, and no others, must be carried in all weathers, from sunset to sunrise.

Article 2 of *British Regulations*. The meaning is that the lights shall be fairly visible. See *Nymph of Chester*, *Holt's Rule of the Road at Sea*, p. 34.

### *Lights for sea-going steamships.*

Rule 3. Sea-going steamships, when under way,<sup>1</sup> must carry:

1. At the foremast head,<sup>2</sup> a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles;

2. On the starboard side, a green light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so

fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible<sup>1</sup> on a dark night, with a clear atmosphere, at a distance of at least two miles ;

3. On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible<sup>2</sup> on a dark night, with a clear atmosphere at a distance of at least two miles ;

4. These green and red side lights<sup>3</sup> must be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

Article 3 of *British Regulations*. See *The Louisa v. The City of Paris*, *Holt's Rule of the Road*, p. 15.

<sup>1</sup> A vessel with her anchor down, but not actually holden by and under the control of it, is "*under way*," within the meaning of the Admiralty regulation, (1858,) and is bound to exhibit colored lights. *The Esk* ; *The Gitana*, *Law Rep.*, 2 *Adm. & Ecc.*, 350.

A vessel driven from her anchor by a gale of wind, and setting sail to get out to sea, is, even if wholly unmanageable, "*under way*," within the meaning of the Admiralty regulation, (1858,) and is bound to exhibit colored lights ; and an omission to exhibit them is negligence. *George Arkle*, *Lushington's Rep.*, 382.

<sup>2</sup> It has been proposed that there be added after "*foremast head*," the words, "*or below the foreyard, where it can be best seen.*" *Jenkins' Rule of the Road at Sea*, p. 68.

<sup>3</sup> The lights must be so placed as to be visible to an approaching vessel on that side.

Lamps duly screened and fixed on stands secured to the paul-bitts of the windlass, are not placed in a proper position, as required by the regulations of 1863, respecting lights. *The Gustav* ; *The New Ed*, 9 *Law Times Rep.*, (N. S.), 547.

<sup>4</sup> The insertion of the words "*shall be carried*," after "*red side lights*," has been proposed. *Jenkins' Rule of the Road at Sea*, p. 68.

### *Lights for steam-tugs.*

Rule 4. Steamers, when towing other ships, must carry two bright white masthead lights vertically, in addition to their side lights, so as to distinguish them from other steamers. Each of these masthead lights

must be of the same construction and character as the masthead lights which other steamers are required to carry.

Article 4 of *British Regulations*.

*Lights for sailing ships.*

Rule 5. Sailing ships under way, or being towed, must carry the same lights as steamers under way, with the exception of the white masthead lights, which they must never carry.

Article 5 of the *British Regulations*.

A proposed modification printed in *Jenkins' Rule of the Road at Sea*, (p. 69,) would substitute the following for the above :

"Sailing ships under weigh, or being towed, shall carry side lights only, namely, a green light on the starboard side, and a red light on the port side, (of the same character, and in the same relative position, and screened similar to those of steamers, as in Article 3.)"

"If a sailing ship is not astern of the towing steamer, but is lashed along-side of her, or has one on either side of her, then she shall carry a bright white light at the foremast head, or below the foreyard, (where it can be best seen,) in addition to the two side lights, and the steamers shall carry none."

'*Lights astern.* Any vessel seeing the lights of another coming up astern of her, shall exhibit or wave a light at the stern until such vessel has passed."

*Exceptional lights for small sailing ships.*

Rule 6. Whenever, as in the case of small ships during bad weather, the green and red lights cannot be fixed, these lights must be kept on deck, on their respective sides of the ship, ready for instant exhibition, and, on the approach of or to other vessels, must be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, the lanterns containing them must each be painted on the outside with the color of the light they respectively contain, and must be provided with suitable screens.

Article 6 of *British Regulations*, as amended, 1863.

*Lights for ships at anchor.*

Rule 7. Ships, whether steamers or sailing ships, when at anchor in roadsteads or fairways, must 'exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light,' in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all round the horizon, and at a distance of at least one mile.

Article 7 of *British Regulations*.

<sup>1</sup> By Order in Council of January, 1863, the words "between sunset and sunrise," were omitted here.

<sup>2</sup> It has been proposed to substitute the words, "a bright white light only," for the words "a white light," after "hull." *Jenkins' Rule of the Road at Sea*, p. 70.

*Lights for pilot vessels.*

Rule 8. Sailing pilot vessels must not carry any of the lights required for other sailing vessels, except the side lights, but must carry a bright white light at the masthead, visible all round the horizon, and must also exhibit a flare-up light every fifteen minutes.

Article 8 of *British Regulations*, changed so as to include side lights.

Proposed alterations suggest that the range and intensity of the lights, and a fixed relative position for the side lights, should be determined. *Jenkins' Rule of the Road at Sea*, p. 72.

*Lights for fishing vessels and boats.*

Rule 9. Open fishing boats and other open boats are not required to carry the side lights required for other vessels; but if they do not carry such lights, they must carry a lantern having a green slide on the one side and a red slide on the other side; and on the approach of or to other vessels, such lantern must be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

Fishing vessels and open boats, when at anchor, or attached to their nets, and stationary, must exhibit a bright white light.

Fishing vessels and open boats shall, however, not



be prevented from using a flare-up light in addition, if considered expedient.

Article 9 of *British Regulations*.

*Fog-signals.*

Rule 10. Whenever there is fog, whether by day or night, the fog-signals described below must be carried and used, and must be sounded at least every five minutes, viz. :

1. Steamers under way must use a steam-whistle, placed before the funnel, not less than eight feet from the deck ;

2. Sailing ships under way must use a fog-horn ;

3. Steamers and sailing ships, when not under way, must use a bell.

Article 10 of *British Regulations*.

1

*Two sailing ships, or two ships under steam, meeting.*

Rule 11.<sup>1</sup> If two sailing ships, or two ships under steam, are meeting, end on, or nearly end on, in such manner as to involve risk of collision, the helms of both must be put to port, so that each may pass on the port side of the other.<sup>2</sup>

This rule only applies<sup>3</sup> to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases in which it applies, are when each of the two ships is end on, or nearly end on, to the other : in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own, and, by night, to cases in which each ship is in such a position as to see both the side lights of the other. It does not apply, by day, to cases in which a ship sees another ahead crossing her own course ; or, by night, to cases where the red light of one ship is opposed to the red light of the other ; or,

where the green light of one ship is opposed to the green light of the other ; or, where a red light without a green light, or a green light without a red light, is seen ahead ; or, where both green and red lights are seen anywhere but ahead.

<sup>1</sup> Articles 11 and 13 of *British Regulations*.

<sup>2</sup> The following substitutes for the first paragraph have been proposed. (*Jenkins' Rule of the Road at Sea*, p. 72:)

"A sailing ship on the port tack shall keep out of the way of a sailing ship on the starboard tack, and a sailing ship which is to windward shall keep out of the way of a sailing ship which is to leeward."

"A steamer having another end on, shall port.

On her port side, shall port."

<sup>3</sup> The qualifications which follow are from the Order in Council of 1868.

This amendment of the rule seems to have introduced uncertainty in its practical application.

The collision of the *Bombay* with the *Oneida*, near Yokohama, Japan, January 24, 1870, gave rise to a discussion of the terms of this rule in the *Pall Mall Gazette*, issues of March 21st, 22nd and 24th, and April 12th, 1870.

In the issue of the 21st March, a writer ("Byng Giraud") avers, that collisions at sea are to some extent caused by what he supposes to be the unsettled state of the rule of the road at sea.

And in the issue of the 24th March, the same writer quotes the language of Mr. S. Cave, Vice-President of the Board of Trade: "Collisions are not caused by observance, but by neglect or misconception of these rules."

In the issue of March 22nd, a writer ("T. G.") says, in substance, as follows :

Article 13 applies to two ships under steam, each meeting the other "end on, or nearly end on."

In no other position than end on, or nearly end on, will each show to the other both her colored side lights. And in the case of such meeting, each ship is required by this Article to port, and each passes to the right of the other. This Article can never apply to one of two ships, (as assumed by "Byng Giraud," in letter of 21st instant,) and can never apply at all, unless it applies to both of "two ships meeting end on, or nearly end on."

If one of two ships is required to act under this Article, they are both required to do so.

An Order in Council has expressly stated that this Article applies only to two steamships, (at night) "each of which is in such a position as to see both the side lights of the other."

Article 14 applies to two ships under steam, each crossing the path of the other, so as to involve risk of collision.

So long as the courses of the two ships cross, one of the ships will always have her red light exposed to the green light of the other—one is always to the left of the other. And this Article requires the one to the left to “keep out of the way of the other.”

So long as like is exposed to like—*i. e.*, the green light of one ship is exposed to the green light of the other, or the red light of the one ship is exposed to the red light of the other—the ships are “*passing ships*,” and there is no danger of collision.

If each ship sees the red *and* green lights of the other, they are “*meeting end on, or nearly end on.*”

So long as a green light is exposed to a red light, the ships must be “*crossing ships*,” and collision is almost inevitable, unless the one to the left keeps out of the way.

In the issue of the 24th March, a writer (“R. E. Hooppell”) suggests, that the simple revision required is the leaving out from the rules the words “or nearly end on,” as being ambiguous and misleading.

This suggestion was approved by “Bynd Giraud,” in the same journal.

### *Two sailing ships crossing.*

Rule 12. When two sailing ships are crossing, so as to involve risk of collision, if they have the wind on different sides, the ship with the wind on the port side must keep out of the way of the ship with the wind on the starboard side, except when the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship must keep out of the way.<sup>1</sup> But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward must keep out of the way of the ship which is to leeward.

Article 12 of *British Regulations*.

<sup>1</sup> Cited and applied in *Dean v. Mark*; The “*Constitution*,” 2 *Moore’s Privy Council Rep.*, (N. S.,) 453; 10 *Jurist*, 831; 10 *Law Times Rep.*, (N. S.,) 894.

### *Two ships under steam crossing.*

Rule 14.<sup>1</sup> If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side must keep out of the way of the other.<sup>2</sup>

<sup>1</sup> Article 14 of *British Regulations*.

Article 13 is superseded by Rule 11.

<sup>2</sup> The words "shall starboard and stop, and reverse if necessary," have been proposed to be substituted for "shall keep out of the way of the other." *Jenkins' Rule of the Road at Sea*, p. 73.

*Sailing ship and ship under steam.*

Rule 15. If two ships, one of which is a sailing ship, and the other a steamer, are proceeding in such directions as to involve risk of collision, the steamer must keep out of the way of the sailing ship.

Article 15 of *British Regulations*.

It has been proposed to substitute the following in place of this rule: "A steamship shall keep out of the way of a sailing ship." *Jenkins' Rule of the Road at Sea*, p. 73.

The American rule permits a steamer to go either to the right or the left of a sailing ship, which has the wind free. The Osprey, *Sprague's Decisions*, 245; Steamer Oregon v. Rocca, 18 *Howard's U. S. Supreme Ct. Rep.*, 570.

The English statute rule requires her to go to the right. 17 & 18 *Vict.*, c. 104, § 296.

The principle upon which the steamship is liable, even though the sailing ship is culpable, is laid down in *Inman v. Reck*; *The City of Antwerp*, and *The Friedrich*, 37 *Law Jour. Adm.*, 25; 2 *Law Rep.*, P. C., 25.

*Ships under steam to slacken speed.*

Rule 16. Every steamer, when approaching another ship, so as to involve risk of collision, must slacken her speed, or, if necessary, stop and reverse, and, every steamer, when in a fog, must go at a moderate rate of speed.

Article 16 of *British Regulations*.

<sup>1</sup> Alterations proposed omit all but the last clause. *Jenkins' Rule of the Road at Sea*, p. 73.

*Ships overtaking other ships.*

Rule 17. Every ship overtaking another, must keep out of her way.

From Article 17 of *British Regulations*,

*Construction of preceding rules.*

Rule 18. Where, by the rules of navigation contained in this Code, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the next rule.

Article 18 of *British Regulations*.

*Proviso to save special cases.*

Rule 19. In applying the rules of navigation contained in this Code, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in a particular case, rendering a departure from the rules necessary, in order to avoid immediate danger.

*Article 19 of British Regulations.*

If a ship bound to keep her course under the 18th sailing rule of 1863, justifies her departure from that rule under the 19th rule, she takes upon herself the obligation of showing not only that her departure was, at the time it took place, necessary, in order to avoid immediate danger, but also that the course adopted by her was reasonably calculated to avoid that danger. The *Agra and Elizabeth Jenkins*, *Law Rep.*, 1 *P. C.*, 501; citing *Holt, Rule of the Road*, p. 101; *The George Dean v. The Constitution*, Admiralty Court, 1 Feb., 1865; *the Planet v. The Aura*, Admiralty Court, 7 Dec., 1865.

A departure from a rule or usage is not only justified when a compliance would be dangerous from special circumstances, but becomes a positive duty when such compliance would endanger or injure another vessel, and then a compliance with the rule or usage would be no excuse. *Allen v. Mackay*, *Sprague's Decisions*, 219; *The Vanderbilt*, *Abbott's Adm. Rep.*, 361; *The Friends*, 1 *W. Robinson's Rep.*, 478; *The Commerce*, 3 *Id.*, 287; *The Steamer Oregon v. Rocca*, 18 *Howard's U. S. Sup. Ct. Rep.*, 572; *Crockett v. Newtown, Id.*, 583; 2 *Parsons on Contracts*, 313.

*No ship under any circumstances to neglect proper precautions.*

Rule 20. Nothing in the rules of navigation contained in this Code shall exonerate any ship, or the owner, master, or crew thereof, from the consequences of any neglect to carry lights or signals, or to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

*Article 20 of British Regulations.*

Alterations proposed (*Jenkins' Rule of the Road at Sea*, p. 74.) omit this and the two preceding rules, and substitute the following:

"Every steamship must carry a compass on the bridge."

*Duty of succor.*

378. It is the duty of all persons on the high seas to render assistance to ships or persons in distress,

whether from collision or otherwise, so far as it can be done with reasonable safety to themselves.

The *Germania*, 21 *Law Times Rep.*, (*N. S.*), 44.

By 25 & 26 *Vict.*, c. 63, s. 33, in case of collision between two ships, it is the duty of "the person in charge" of each ship to render assistance to the other; and, in case he fails to do so, without reasonable excuse, the collision shall, in absence of proof to the contrary, be deemed to have been caused by his wrongful act.

This principle was applied in *The Queen of the Orwell*, 7 *Law Times*, (*N. S.*) 839; 11 *Weekly Rep.*, 499.

The "person in charge," intended by that section, is the master. *The Queen*; *The Lord John Russell*, *Law Rep.*, 2 *Adm. & Ecc.*, 354.

## CHAPTER XXXIII.

### COLLISION.

These rules are chiefly from the *Civil Code*, reported for *New York*, p. 115, and the *German General Mercantile Law*. For a discussion on the liability for collision at sea, see *The Transactions of the British National Association for Promotion of Social Science*, 1859, p. 216.

ARTICLE 379. Loss, how apportioned.

380. Faults of navigation.

381. Who liable.

382. Personal liability of wrong-doer.

383. Compulsory pilotage.

383a. Colliding ships to help each other.

*Loss, how apportioned.*

**379.** Losses caused to ship, freight,<sup>1</sup> or freightage, by any<sup>2</sup> collision of two or more ships,<sup>3</sup> are to be borne as follows:

1. If either party was exclusively in fault, he must bear his own loss, and compensate the other for any loss he has sustained;<sup>4</sup>

2. If either was in fault, the loss must be borne by him on whom it falls:<sup>5</sup>

3. If both were in fault, the loss is to be equally divided,<sup>6</sup> unless it appears that there was a great disparity in fault, in which case the loss must be equitably apportioned; or, unless it appears that both parties

were willfully in fault, in which case the loss must be borne by him on whom it falls ;' or,

4. If it cannot be ascertained where the fault lies, the loss must be equally divided.<sup>1</sup>

<sup>1</sup> The *Narragansett*, *Olcott*, 246 ; *Allen v. Mackay*, *Sprague's Decisions*, 219. The word "freight" is used to designate whatever is borne, as most likely to avoid the use of the same word in two senses, freight being in frequent use for the thing carried, as well as for the price of carriage.

<sup>2</sup> These are applicable, whether one or both of the ships are sailing, drifting, anchored, or fastened to the shore. *German Mercantile Law*, § 738.

<sup>3</sup> The owner of a vessel solely in fault is answerable for damages caused by a second vessel being driven by the collision against a third. *Germ. Merc. Law*, § 741.

<sup>4</sup> The *Scioto*, *Daveis' Rep.*, 359 ; The *Woodrop-Sims*, 2 *Dods.*, 83 ; The *Sappho*, 9 *Jurist*, 560 ; *Reeves v. The Constitution*, *Gilpin's Rep.*, 579. Where repairs are practicable, the damages awarded must be sufficient to restore the injured vessel to the condition in which she was before the collision, without any deduction from new for old. The *Baltimore*, 8 *Wallace's U. S. Sup. Ct. Rep.*, 377.

<sup>5</sup> The *Woodrop-Sims*, *supra* ; *Stainback v. Rae*, 14 *Howard's U. S. Sup. Ct. Rep.*, 532 ; The *Itinerant*, 2 *W. Robinson's Rep.*, 236 ; The *Celt*, 3 *Haggard's Adm.*, 328, note. An inevitable accident is defined in The *Virgil*, 2 *Robinson's Rep.*, 201, to be, "that which the party charged with the offense could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." The *Uhla*, 19 *Law Times Rep.*, (*N. S.*) 89.

<sup>6</sup> This is the rule in admiralty courts. *Cushing v. The John Fraser*, 21 *Howard's U. S. Sup. Ct. Rep.*, 184 ; *Rogers v. The St. Charles*, 19 *Id.*, 108 ; The *Catherine v. Dickinson*, 17 *Id.*, 177 ; *Vaux v. Sheffer*, 8 *Moore's Privy Council Rep.*, 75. It is otherwise at common law. *Dorrell v. Gen. St. N. Co.*, 5 *Ellis & Blackburn's Rep.*, 195 ; *Gen. St. N. Co. v. Mann*, 14 *Common Bench Rep.*, 127. See *Barnes v. Cole* ; 21 *Wendell's (New York) Rep.*, 188.

<sup>7</sup> In this case, the court will not interfere in favor of either party. *Sturgis v. Clough*, 21 *Howard's U. S. Sup. Ct. Rep.*, 451.

<sup>8</sup> The *Scioto*, *Daveis' Rep.*, 359 ; The *Catherine of Dover*, 2 *Haggard's Adm.*, 145 ; *Lucas v. The Swann*, 6 *McLean's U. S. Circ. Ct. Rep.*, 282 ; The *Nautilus*, *Ware's Rep.*, 529.

### *Faults of navigation.*

380. Collisions caused by the want of compliance, on the part of any ship, with the rules of Chapter XXXII., on NAVIGATION, whatever may be the excuse for such want of compliance,<sup>1</sup> and collisions to which a ship not lawfully engaged in navigation is a party,<sup>2</sup>

are to be deemed caused by the fault of such ship.

<sup>1</sup> *The Emperor v. The Zephyr, Holt's Rule of the Road*, p. 24; *12 Weekly Rep.*, 890, *Adm.*; *The Pyrus v. The Smaler, Holt's Rule of the Road*, p. 40.

Compare, however, *Kissam v. The Albert*, *11 Am. Law Reporter*, (*N. S.*) 41.

<sup>2</sup> *The Maverick, Sprague's Decisions*, 23.

It may perhaps be questioned whether this should be applied to ships without national papers. See Article 69.

### *Who liable.*

**381.** The party in fault, within the meaning of article 379, is the owner of that ship, defects in which, or in the appurtenances or management of which, or the acts or omissions of inmates of which, contribute to produce the collision.

The ship<sup>1</sup> itself, and such freightage as is due,<sup>2</sup> are also liable, but neither the freight nor the owners thereof.<sup>3</sup>

<sup>1</sup> *The Ruby Queen, Lushington's Rep.*, 266.

A *bona fide* transfer without notice does not divest the injured party's lien, if he is not guilty of laches in enforcing it. *Edwards v. The Stockton, Crabbe's Rep.*, 580; *The Bold Buccleugh*, 3 *W. Robinson's Rep.*, 220; *Harmer v. Bell*, 7 *Moore's Privy Council Rep.*, 267. But this lien, like every admiralty lien, may be lost by delay to enforce it. *The Admiral*, 18 *Law Reporter*, 91.

<sup>2</sup> *German General Mercantile Law*, Part VIII., Art. II., § 736; *The Victor, Lushington's Rep.*, 72.

<sup>3</sup> Freightage on cargo *due* to the ship owner is liable; deductions, as by charter, from gross freight, and reasonable deductions for non-delivery at port of destination, being allowed. *The Leo, Lushington's Rep.*, 444; 31 *Law Journal, Adm.*, 78; 6 *Law Times*, (*N. S.*) 58.

### *Personal liability of wrong-doer.*

**382.** Article 379 does not affect the personal liability of the inmate of any ship for the consequences of his own fault.

*German Gen. Mercantile Law*, Part VIII., Art. II., § 736; and see *Hale v. Washington Ins. Co.*, 2 *Story's U. S. Circ. Ct. Rep.*, 176; *The Wild Ranger*, 32 *Law Journal, Adm.*, 49; 7 *Law Times*, (*N. S.*) 725; 9 *Jurist* (*N. S.*) 134.

### *Compulsory pilotage.*

**383.** When the ship is in charge of a pilot, where



pilotage is compulsory, and the crew have performed the duties required of them,<sup>1</sup> the owner and ship are not responsible for the collision if caused by the pilot ;<sup>2</sup> but it is the duty of the State by which the employment of the pilot was compelled, to indemnify the parties injured.<sup>3</sup>

<sup>1</sup> In the *Minna*, *Law Rep.*, 2 *Adm. & Ecc.* 97, the owners of a wrong-doing ship having, by compulsion of law, a pilot on board, were held not to be exempt, under the 388th section of the Merchant Shipping Act, 1854, from liability for damages, where a neglect of duty on the part of the master conduced to the collision.

<sup>2</sup> *German General Mercantile Law*, Part VIII., § 740. Having a pilot on board is not an exoneration. *The Carolus*, 2 *Curtis' U. S. Circuit Ct. Rep.*, 69 ; *Denison v. Seymour*, 9 *Wendell's (New York) Rep.*, 9.

<sup>3</sup> This qualification is added, as being a reasonable condition to annex to compulsory pilotage.

The expediency of the law of compulsory pilotage, so far as it exempts the owner of the wrong-doing vessel from all liability, was considered and questioned in *The Halley*, *Law Rep.*, 2 *Adm. & Ecc.*, 3, where the plaintiffs, owners of a foreign vessel, claimed damages for a collision between their vessel and an English ship, in Belgian waters. The defendants, the owners of the English ship, pleaded that, by the Belgian laws, pilotage was compulsory in the place where the collision occurred. It was held, that the plaintiffs were entitled to plead, in reply, that, by the same laws, the owner of the wrong-doing vessel, although compelled to take a pilot on board, continued liable for the damages.

**383a.** In every case of collision on the high seas, the colliding ships must stay by each other, so long as possible, until the whole extent of the damage is ascertained, and all the relief afforded by the least injured ship, which it can possibly afford.

New.

## CHAPTER XXXIV.

### GENERAL AVERAGE.

**ARTICLE 384.** Jettison.

385. Order of jettison.

386. By whom made.

387. General average.

388. Loss, how borne.

389. Loss, how adjusted.

390. Consular power.

391. Jettison of deck cargo.

392. Damage by water and breakage.

ARTICLE. 393. Extinguishing fire on shipboard.

394. Cutting away wreck.

395. Voluntary stranding.

396. Carrying a press of sail.

397. Port of refuge expenses.

398. Wages and maintenance of crew in port of refuge.

399. Damage to cargo in discharging.

400, 401. Contributory values.

### *Jettison.*

**384.** A carrier by water may, when in case of extreme peril it is necessary for the physical safety of the ship or cargo,<sup>1</sup> throw overboard, or otherwise sacrifice, any or all of the cargo or appurtenances of the ship. Throwing property overboard for such purpose is called jettison.

<sup>1</sup> *Lawrence v. Minturn*, 17 *Howard's U. S. Sup. Ct. Rep.*, 100.

This and several of the following Articles are, substantially, from the *Civil Code, reported for New York*, pp. 336, 337.

"To constitute a case of general average," says Judge MARVIN, (*Report on Int. Gen. Ave.*), "three things must concur: 1st. There must be a common danger impending, in which ship, freight, and cargo participate. 2nd. There must be a sacrifice of a portion of the ship or cargo, or extraordinary expenses incurred for the purpose of avoiding that common peril. 3rd. The attempt to avoid the peril must be successful."

"The English and French systems, as administered by the average adjusters, in the absence of express decisions of the courts on the question, accord best with the idea, that the motive for making the sacrifice or incurring the expense *must* be the common *physical* safety of the property; and this attained, the general average charges cease, although the ship may not have completed the voyage. The American system accords best with the idea, that the motive *may* be either the physical safety of the property, or the common benefit; *i. e.*, the arrival of the ship and cargo in company at the port of delivery. The English and French systems recognize the idea, that the community of interest is interrupted or suspended by the landing of the cargo in a place of safety, however remote from the port of destination; whereas the American system recognizes the community of interest as continuing, uninterruptedly, until the termination of the adventure."

### *Order of jettison.*

**385.** A jettison must begin with the heaviest and least valuable articles, so far as may be practicable.

*Code de Commerce*, Art. 411.

### *By whom made.*

**386.** A jettison can be made only by authority of

the master of a ship, except in case of his disability, or of an overruling necessity, when it may be made by any other person.

<sup>3</sup> *Kent's Commentaries*, 233.

### *General average.*

**387.** Except as hereinafter provided, all losses caused by jettison, and all damage done to ship or freight,<sup>1</sup> or both, by the master, or by his orders, when necessary for the physical safety of the ship or cargo,<sup>2</sup> as also the consequential damage resulting therefrom, and the expenses incurred for the same purpose, are general average.<sup>3</sup>

<sup>1</sup> In addition to exceptions mentioned in the following Articles, the *German Mercantile Law* excepts goods not represented by bill of lading or manifest, and money and valuables of which the master was not informed. § 710, sub. 2, 3.

<sup>2</sup> As to whether this should be extended to sacrifices for the common benefit in other cases, see note to Article 384.

<sup>3</sup> "The question has been raised whether general average contribution is due when the danger originates in the mismanagement or fault of the master or owner of the cargo, or a third person. Some Codes provide, and among them the new German Code, that contribution shall in such case take place, but the party at fault shall not receive anything, but shall be liable to reimburse the other contributors." *Marvin, Report on Int. Gen. Ave.*

### *Loss, how borne.*

**388.** A general average loss,<sup>1</sup> when lawfully made, must be borne in due proportion by all that part of the ship, appurtenances, freightage and freight, for the benefit of which the sacrifice was made, and which was really saved,<sup>2</sup> as well as by the owner of the thing sacrificed.<sup>3</sup>

<sup>1</sup> By the *German General Mercantile Law*, § 707, a claim for damage belonging to general average is only so far set aside by a particular average subsequently affecting the damaged article, (whether it be again damaged or totally destroyed,) as it is proved that the latter misfortune not only was in no way connected with the former, but that it would also have resulted in the former damage if this had not already been occasioned.

If, however, before the occurrence of the latter misfortune, steps should already have been taken to reinstate the damaged article, then the claim

for reimbursement holds good so far as such steps are concerned. See *Barnard v. Adams*, 10 *Howard's U. S. Sup. Ct. Rep.*, 270, 303.

<sup>2</sup> *German General Mercantile Law*, § 705. It is added there in §§ 706 and 7, that the obligation to contribute to general average from an article saved, is not annulled because the article is subject subsequently to particular average, unless it is totally destroyed.

That Code also provides that ammunition and provisions of the ship, wages and effects of crew, and baggage of passengers do not contribute. § 725.

<sup>3</sup> *Lee v. Grinnell*, 5 *Duer's (New York) Rep.*, 431; *Simonds v. White*, 2 *Barnewall & Cresswell's Rep.*, 805. But by the *German Mercantile Law*, an average loss does not in general constitute a personal liability. § 728.

### *Loss, how adjusted.*

**389.** The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost as the value of his part of the property affected bears to the value of the whole. But an adjustment made at the end of the voyage, if valid there, is valid everywhere.<sup>1</sup>

<sup>3</sup> *Kent's Commentaries*, 233.

<sup>1</sup> *Simonds v. White*, 2 *Barnewall & Cresswell's Rep.*, 805.

The *German General Mercantile Law* (§§ 711, &c.,) contains provisions regulating the adjustment in detail.

### *Consular power.*

**390.** A nation may give to its consuls power to adjust averages and regulate repairs, in the cases of ships of such nation coming within the country of the consul's residence, when such acts are demanded by a party concerned who has no domicile in the country, and there is no agreement between the parties for a different mode of adjustment, or regulation of repairs.

But a consular adjustment, or average, or regulation of repairs, made under this article, does not bind any person who is either domiciled in the country, or a member of a third nation, unless he consents to the submission to the consul.

Suggested by the treaty between the United States and France, Feb. 23, 1853, Art. X., (10 *U. S. Stat. at L.*, 998,) which provides that consuls shall

receive the declarations, protests, and reports of all captains of vessels of their nation, in reference to injuries experienced at sea. They shall examine and note the storage. . . . In the absence of a stipulation to the contrary between owners, freighters, and insurers, they shall be charged with the repairs . . . . If inhabitants of the country or members of a third nation are interested, and the parties cannot agree, the local authorities shall decide.

To the same effect is the provision in the treaty between the United States and

Belgium, Dec. 5, 1868, Art. XIII., *U. S. Cons. Reg.*, (1870,) ¶ 511.

Italy, Feb. 8, 1868, " XIV., 15 *U. S. Stat. at L.*, (*Tr.*) 185.

And as to consular power to settle damage to effects and merchandise shipped in such vessels, see treaty between the United States and

New Granada, May 4, 1850, Art. III., 10 *U. S. Stat. at L.*, 900.

### *Jettison of deck cargo.*

**391.** A jettison of timber or deals, or any other description of wood freight, carried on the deck of a ship, in pursuance of a general custom of the trade in which the ship is then engaged, must be made good as general average, in like manner as if such freight had been jettisoned from below deck.

No jettison of deck freight, other than timber or deals, or other wood so carried, is to be made good as general average.<sup>1</sup>

Every structure, other than mast, spars and rigging, not built in with the frame of the ship, below deck, is to be considered a part of the deck of the ship.

This and the ten following articles are from the Report prepared by Judge WILLIAM MARVIN, in the Proceedings of the International Congress held at York, England, September, 1864, for the purpose of promoting a uniformity in the mode of adjusting general averages in the different countries of the world.

<sup>1</sup> The American rule is, that the owner of things stored on deck, in case of their jettison, is entitled to the benefit of a general average contribution *only in case it is usual* to stow such things on deck upon such a voyage. *Lawrence v. Minturn*, 17 *Howard's U. S. Supreme Ct. Rep.*, 100; *Sayward v. Stevens*, 3 *Gray's Rep.*, 97; *Smith v. Wright*, 1 *Caines' Rep.*, 43; *Lenox v. United Ins. Co.*, 3 *Johnson's Cases*, (*New York*), 178; *Harris v. Moody*, 4 *Bosworth's (New York) Rep.*, 210; *Gould v. Oliver*, 4 *Bingham's Rep.*, (*N. C.*) 134; *S. C.*, 2 *Manning & Granger's Rep.*, 208; *Milward v. Hibbert*, 3 *Queen's Bench Rep.*, 120.

The *German General Merchantile Law*, (§ 710,) recognizes, as an exception, deck cargo in the coasting trade, when allowed by law.

*Damage by water and breakage.*

**392.** Damage done by water which unavoidably goes down a ship's hatches opened, or other opening made for the purpose of a jettison, must be made good as general average, in case the loss by jettison is so made good.<sup>1</sup>

Damage done by breakage and chafing, or otherwise from derangement of stowage consequent upon a jettison, must be made good as general average.<sup>2</sup>

<sup>1</sup> Such damage is considered as an accessory of the jettison, or the immediate direct consequence of making the jettison. *German Code*, § 708; *French Code*, § 400; *Holland Code*, § 699; *Baily*, 171; 13 *Peters' U. S. Sup. Ct. Rep.*, 343; *Phillips*, § 1286.

<sup>2</sup> This damage is rejected by the average adjusters in England and Belgium.

To similar effect, however, is the consular convention between France and

Portugal, July 11, 1866, Art. XV., 9 *De Clercq*, 582.

Austria, Dec. 11, 1866, " XIII., 9 *Id.*, 669.

Brazil, Dec. 10, 1860, " X., 8 *Id.*, 153.

Treaty between France and

Peru, Mar. 9, 1861, Art. XXXII., 8 *De Clercq*, 193.

Convention between the United States and

Italy, Feb. 8, 1868, Art. XIV., 15 *U. S. Stat. at L.*, (Tr.), 165.

*Extinguishing fire on shipboard.*

**393.** Damage done to a ship and freight, or either of them, by water or otherwise, in extinguishing a fire on board the ship, is the subject of general average.

This damage is rejected from general average in England, and admitted in the United States, Holland and Belgium. *Baily*, 81; 5 *Duer's (New York) Rep.*, 310; 25 *Pennsylvania Rep.*, 366.

*Cutting away wreck.*

**394.** Loss caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea peril, is not to be made good as general average.

This damage is not allowed in general average in England or the United States. It is allowed in France. So by the *German Mercantile Law*, § 708.

In Belgium, in practice, one-third of the value is considered as general average, one-third particular, and one-third new for old.

In Holland, the value of the wreck, as such, is contributed for.

*Voluntary stranding.*

**395.** When a ship is intentionally run on shore because she is sinking, or driving on shore or rocks, the damage caused to the ship, the freight, and the freightage, or any of them, by such intentional running on shore, is not to be made good by general average.

The question, says *Marvin*, (*Report on Int. Gen. Ave.*), has never been decided by the courts of England, but the uniform practice of the average adjuster is to disallow this loss or damage in general average. *Baily*, 75.

In France and Spain, it is allowed in general average, provided the ship is got off with her cargo on board, or if, the cargo having been landed, she takes her cargo again on board, and proceeds to a port of refuge, or resumes her voyage. *M. Cauvet*, §§ 345-7.

But if the ship is lost, there is no contribution. The Marine Ordinance of Louis XIV., declares that if the jettison does not save the ship, there is no ground for contribution. *Valin*, Liv. 3, Tit. 8; *Du jet et de la contribution*; *Spanish Code*, Art. 933.

The new *German Code*, § 708, declares that damages caused by a voluntary stranding, in order to avoid capture or sinking, are general average; but if the stranding was in order to avoid *sinking*, and the ship is not got off, or, after being got off, is found incapable of repair, the damage is not general average.

The maritime laws of Holland, Norway, Sweden, Denmark, and the United States, all make damage caused by voluntary stranding general average, and this without regard to the question whether the ship is subsequently refloated or not. *Adams v. Barnard*, 10 *Howard's U. S. Sup. Ct. Rep.*, 270; *Columbian Ins. Co. v. Ashby*, 13 *Peters' U. S. Sup. Ct. Rep.*, 331.

*Carry a press of sail.*

**396.** Damage occasioned to a ship or freight, by carrying a press of sail, is not to be made good by general average.

*Covington v. Roberts*, 2 *Bosanquet & Puller's Rep.*, 378; *Fignet*, 390, 394; *Cauvet*, § 352. The *German Mercantile Law* adds, (§ 709,) "when the press of sail was carried to avoid stranding or capture."

*Port of refuge expenses.*

**397.** When a ship shall have entered a port of refuge, under such circumstances that the expenses of entering the port are admissible for general average, and when she shall have sailed thence, with her original freight, or a part of it, the corresponding expenses of leaving

the port shall likewise be so admitted for general average; and whenever the cost of discharging freight at such port is admissible for general average, the cost of reloading and stowing such freight on board the ship, together with all storage charges on such freight, are likewise admissible; except that any portion of the freight left at such port of refuge, on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it, is not liable to contribute to such general average.

*Wages and maintenance of crew in port of refuge.*

**398.** When a ship shall have entered a port of refuge, under the circumstances mentioned in the last article, the wages and cost of maintenance of the master and mariners, from the time of entering the port until the ship shall have been made ready to proceed upon her voyage, are to be made good by general average; except that any portion of the freight left at such port of refuge, on account of its being unfit to be carried forward, or on account of the unfitness or inability of the ship to carry it, is not liable to contribute to such general average.

The conflict of authority on the question of port of refuge expenses, is fully discussed in *Judge Marvin's Report*, p. 30; citing *Hopkins*, 45; *Baily*, 179-80; *Hall v. Jansen*, 4 *Ellis & Blackburn's Rep.*, 500; *Journal du Palais*, vol. 72, p. 9; vol. 74, p. 613; vol. 75, pp. 189, 540; *Cauvet*, 362, 372, 374; *Dalloz, Jurisp., Gen.*, 1864, p. 70; *Antwerp Customs*, by *Engles and Van Pebourgh*; *Guide Generalis des Ass. Mar.*, p. 374; *Code de Com. of Spain*; *Concordance outre les Codes*, by *St. Joseph*; *Manuel de l'Assuré*, by *Morel*; *Nelson v. Belmont*, 21 *New York Rep.*, 36; *McAndrews v. Thatcher*, 3 *Wallace's U. S. Sup. Ct. Rep.*, 347; *Job v. Langton*, 6 *Ellis & Blackburn's Rep.*, 779.

*Damage to cargo in discharging.*

**399.** Damage done to freight by discharging it at a port of refuge, is not admissible for general average if such freight shall have been discharged at the place and in the manner customary at that port with ships not in distress.

In practice, this damage is not allowed in general average by the Eng.



lish adjusters, but is by the American. 1 *Wallace, Jr.'s U. S. Circ. Ct. Rep.*, 355. And see *Cauvet*, § 372.

Besides the foregoing classes of general average losses, the *German Mercantile Law* includes :

Hire of lighters, and damage by reshipping in lightening the ship ; § 708, sub. 2.

Ammunition, and expenses of wounded and dead, and the compensations, on a defense against enemies and pirates ; sub. 5.

Redemption from capture, and maintenance, and ransom of hostages ; sub. 6.

Losses and expenses of obtaining money during the voyage for payment of general average, and expenses of apportionment ; sub. 7.

### *Contributory values.*

**400.** The contribution to a general average must be made upon the actual values of the property at the termination of the adventure, to which must be added the amount made good by general average for property sacrificed ; deduction being made from the ship-owner's freightage, and passage-money at risk, of two-fifths of such freightage, in lieu of crew's wages, port charges, and all other deductions ; deduction being also made from the value of the property, of all charges incurred in respect thereof, subsequently to the arising of the claim to general average.

The provision on this subject in the *Civil Code reported for New York*, p. 337,) is as follows :

In estimating values for the purpose of a general average, the ship and appurtenances must be valued as at the end of the voyage, the freightage at one-half the amount due on delivery, and the cargo as at the time and place of its discharge ; adding, in each case, the amount made good by contribution. See 3 *Kent's Commentaries*, 242 ; 5 *Duer's (New York) Rep.*, 429 ; 1 *Caines' Rep.*, 373 ; 2 *Sergeant & Rawle's (Pennsylvania) Rep.*, 229.

### *The same.*

**401.** In every case in which a sacrifice of freight is made good by general average, the loss of freightage, if any, which is caused by such loss of freight, is likewise to be made good.

The principle of a limitation of the liability of the ship-owner to the value of the ship and freight, for the acts and contracts of the master, is incorporated into the system of commercial law of France, Belgium, Holland, the German States, and probably every country on the continent of Europe. *French Code*, 216 ; *Holland Code*, 321 ; *German Code*, 452.

And, whether the general average consists of sacrifices to be made good, or expenses to be reimbursed, the contributory values are the same and are the values *saved* at the termination of the adventure. In both cases, if there is no salvage, there is no contribution. *Cauvet*, § 418.

But the English and American courts do not limit the liability of the ship-owner to the value of the ship and freight. 7 *Johnson's (New York) Rep.*, 413; 9 *Massachusetts Rep.*, 548; 14 *Id.*, 66; 2 *Phillips*, § 1374; 2 *Arnould*, 344; 5 *Common Bench Rep.*, 330.

And in the law of these countries, a distinction obtains, in certain cases, between *sacrifices* and *expenditures*, in fixing the contributory values in the adjustment of general averages. As to losses arising out of *sacrifices*, the law is the same as in the other countries above named. But in adjusting losses arising from *expenditures*, not secured by bottomry or respondentia, the value of the property at the time the expenses are incurred, is taken as the true contributory value, and contribution may be exacted in this case, though nothing is ultimately saved. 2 *Phillips*, § 1374; 2 *Arnould*, §§ 344-349; 9 *Massachusetts Rep.*, 548; *Phillips' Be-necke*, 241.

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## CHAPTER XXXV.

### SALVAGE.

ARTICLE 402. When allowed.

403. Officers, seamen and pilots.

404. Forfeiture of salvage.

405. Special contract.

406. Amount, how fixed.

407. Apportionment between several salvors.

*When allowed.*

402. Except as provided in the next article, any person<sup>1</sup> who rescues, or contributes to rescue<sup>2</sup> from danger<sup>3</sup> a ship, her appurtenances, cargo, or other property, against which a court of admiralty may give a remedy;<sup>4</sup> or who rescues, or contributes to rescue the lives of the persons belonging to such ship,<sup>5</sup> is entitled to a reasonable compensation therefor, to be paid out of the property saved.<sup>6</sup>

Such compensation is termed *salvage*.<sup>7</sup>

<sup>1</sup> It has been a mooted question in American courts, whether salvage

should be awarded to wrecking companies organized, and employing paid servants at regular wages, to rescue wrecks and vessels in distress. 1 *Abbott's Jurisdiction & Practice of U. S. Courts*, 583. But it seems to accord with sound public policy to recognize such claims. The *Camanche*, 8 *Wallace's U. S. Sup. Ct. Rep.*, 448. Therefore, no restriction is inserted here. The apportionment of the sum awarded between the company and their servants, in such cases, must depend upon their contract.

<sup>2</sup> An abandoned attempt does not entitle the maker to share in the salvage of a subsequent successful attempt by others. Otherwise, where successive assistances are rendered by different persons, all contributing to the rescue. The *Island City*, 1 *Black's U. S. Sup. Ct. Rep.*, 121.

Attempted services performed under an agreement of salvage, are entitled to be rewarded when the performance of them is rendered impossible by overruling necessity. The *Undaunted*, 29 *Law Journal, Adm.*, 176; *Lushington's Rep.*, 90.

<sup>3</sup> The danger may be of damages of the seas, fires, pirates, or enemies. *Jones on Salvage*, p. 1.

The German law says, in case of "distress" or "danger." The American doctrine is, that there must be danger beyond the ordinary exposures, and requiring more than the ordinary services. Certainty of destruction without the service is not essential. 1 *Abbott's Jurisdiction & Practice of U. S. Courts*, 574. See, also, The *Charlotte*, 3 *W. Robinson's Rep.*, 71.

Even though a vessel has sustained no real damage, yet if she is in a position of reasonable apprehension of actual danger, assistance rendered to her under such circumstances will be of the nature of a salvage service. *Jones on Salvage*, p. 3; The *Aztecs*, 21 *Law Times*, (N. S.), 797. See, also, The *Raikes*, 1 *Haggard's Adm.*, 246; The *Phantom*, *Law Rep.*, 1 *Adm. & Ecc.*, 58; and The *Joseph C. Griggs*, 1 *Benedict's Adm.*, 80.

It would be equally a salvage service whether it were rendered at sea, or upon property wrecked at sea, but then upon land. *Stephens v. Bales of Cotton, Bee*, 170.

<sup>4</sup> A Raft of Spars, *Abbott's Adm. Rep.*, 485; and see *Tome v. Dubois*, 6 *Wallace's U. S. Supreme Court Rep.*, 548.

Valuable papers, &c., and life are not the subjects of salvage. The *Emblem*, *Daveis' Rep.*, 61; The *Mulhouse*, 12 *American Law Rep.*, (N. S.), 276.

The principle seems to be, that salvage may be allowed upon any description of property found in peril at sea, which is of such a nature that it might be the specific subject of proceedings in admiralty as a means of paying the amount awarded. The remedy, however, is personal, as well as against the specific thing.

<sup>5</sup> The *English Merchant Shipping Act*, 1854. See, also, The *Eastern Monarch*, *Lushington's Rep.*, 81; The *Thomas Fielden*, 32 *Law Jour., Ad.*, 61. See, however, note 4, above.

Where there is a joint salvage, a vessel saving life as well as property has been awarded a higher remuneration than one saving property alone. The *Clarisse*, *Swabey's Rep.*, 129. See, also, The *Coromandel*, *Id.*, 205; The *Bartley*, *Id.*, 198; The *Alma*, *Lushington's Rep.*, 378.

The owners of the cargo must bear their proportion of salvage awarded for saving the lives of passengers on board the vessel ; and it seems that their liability in this respect is not affected by the fact that the efforts of the salvors did not contribute to the safety of the cargo. *The Fusileer*, 34 *Law Journ., Ad.*, 25.

<sup>6</sup> The *German Code* further provides, (§ 753,) that " with respect to the salvage and assistance expenses, which shall be understood to include the amount awarded for such salvage and assistance, the creditor has a lien on the salvaged or preserved articles, and with respect to the salvaged, may detain them until security for the amount has been given." . . .

(§ 754.) " The master may not deliver the goods, either wholly or in part, until the creditor has been paid, or has received security; otherwise, he makes himself personally liable to the creditor, so far as the latter's claim could have been satisfied out of the delivered goods, at the time of their delivery." . . .

(§ 755.) " Salvage and rendering of assistance do not of themselves impose a personal responsibility for payment of salvage and assistance expenses. But the receiver of the goods, when it is known to him at the time he received them that the same were liable for salvage or assistance expenses, becomes personally liable for such expenses," under certain restrictions.

<sup>7</sup> The German law makes a distinction between salvage, which it only allows " when, in case of distress, a ship or its cargo, being no longer under the control of the crew, or having been abandoned by the same, are taken charge of, either wholly or in part, by third parties, and brought into safety;" and, what is called a claim for assistance, which is allowed " when, in any other case than the above, a ship or its cargo is rescued from a state of distress by the help of third parties."

### *Officers, seamen and pilots.*

**403.** Officers and seamen of the ship concerned, or of a public ship of the nation of the ship concerned,<sup>1</sup> are not entitled to salvage, except in case of services rendered after being discharged from the obligations of their contract.<sup>2</sup>

A pilot not belonging to the ship<sup>3</sup> concerned may claim salvage for services not part of his official duties as pilot.<sup>4</sup>

<sup>1</sup> The English rule is now understood to be, that salvage is not allowed to a national vessel for recapture of another vessel employed in the public service; and this rests upon the ground that the service is in the direct line of duty of a national [public] vessel; but the United States allow salvage in such cases. 12 *Opinions of U. S. Attorneys-General*, 289.

It has been held in the United States, that the officers and crew of a foreign war vessel are entitled to claim as salvors. *Robson v. The Huntress*, 2 *Wallace Jr.'s U. S. Circ. Ct. Rep.*, 59.

<sup>2</sup> If the contract between the owners and the crew be terminated by a *bona fide* and final abandonment of the vessel, the crew may become entitled to salvage reward for the services they subsequently render towards the preservation of the ship or cargo. *Jones on Salvage*, p. 19; *The Florence*, 16 *Jurist*, 572; *The Warrior*, 1 *Lushington's Rep.*, 476; *The Neptune*, 1 *Haggard's Rep.*, 227-237; *The Vrede*, 30 *Law Journal, Adm.*, 209.

Capture by a belligerent dissolves or suspends the connection between the seamen and their vessel; and if they rescue the vessel from the enemy, they are entitled to salvage. *Jones on Salvage*, p. 21; *The Two Friends*, 1 *C. Rob.*, 271. See, also, *Phillips v. McCall*, 4 *Washington's U. S. Circ. Ct. Rep.*, 141; *Williams v. Suffolk Ins. Co.*, 3 *Sumner's U. S. Circ. Ct. Rep.*, 270.

The American doctrine recognizes another qualification, namely, that services entirely above the duties of a seaman, rendered in a spirit of gallantry, may be compensated upon salvage principles. *The John Taylor*, *Newberry's Adm. Rep.*, 341; *The John Perkins*, 9 *American Law Rep.*, (N. S.) 490; *The Dawn*, *Daveis' Rep.*, 121, 142; *Mary Hale*, *Marvin on Salvage*, 161.

<sup>3</sup> *Hobart v. Drogan*, 10 *Peters' U. S. Sup. Ct. Rep.*, 108; *Hand v. The Elvira*, *Gilpin's Rep.*, 60.

The laws of most of the States of the Union make it a part of the duty of a pilot to assist vessels in distress; and, in some instances, give the rate of extra compensation to be awarded; their services being considered as extra-pilotage services, and not as salvage. 2 *Parsons on Shipping*, 271.

<sup>4</sup> *The Wave v. Hyer*, 2 *Paine's U. S. Circ. Ct. Rep.*, 131.

### *Forfeiture of salvage.*

#### 404. No person has a claim for salvage:

1. Who unnecessarily forced the acceptance of his services; <sup>1</sup> or,
2. Who has not immediately notified to the master or owner, if possible, and to the local authorities, the property saved; <sup>2</sup> or,
3. Who has emblezzled or connived at the emblezzlement of any part, however small, of the property saved.<sup>3</sup>

The law upon this point is laid down by Sir JOHN COLERIDGE, in *The Atlas*, 1 *Lushington's Rep.*, 518, 528: Where "success is finally obtained, no mere mistake or error of judgment in the manner of procuring it—no misconduct short of that which is willful, and may be considered criminal, proved beyond a reasonable doubt by the owners resisting the claim—will work an entire forfeiture of salvage. Mistake or misconduct other than criminal, which diminishes the value of the property saved, or occasions expense to the owners, are properly considered in the amount of compensation to be awarded." See *Jones on Salvage*, ch. VII.

Whoever the salvors may be, whether licensed wreckers or not, they are not only bound to be scrupulously honest themselves, but, whilst the property is in their custody, they are expected to employ every reasonable degree of diligence to guard it from plunder by others; and any negligence in this respect will affect the amount of their remuneration. The John Perkins, 19 *American Law Rep.*, 490.

The misconduct of any individual salvor will work a forfeiture of all compensation for his share of the service. The Waterloo, 1 *Blatchford & Howland's Rep.*, 114; The Blaireau, 2 *Cranch's U. S. Sup. Ct. Rep.*, 240.

<sup>1</sup> For instance, a second party of salvors, who wrongfully interfere with the first party. The Blenden Hall, 1 *Dods.*, 414; The Fleece, 3 *W. Robinson's Rep.*, 278.

<sup>2</sup> *German Law*, § 752.

<sup>3</sup> The Island City, 1 *Black's U. S. Sup. Ct. Rep.*, 121; Sch. Dove, 1 *Garrison's U. S. Circ. Ct. Rep.*, 585; The Bello Corrunes, 6 *Wheaton's U. S. Sup. Ct. Rep.*, 152.

*Parsons* suggests that positive and material falsehood should be regarded as an "embezzlement of the truth," and should work a forfeiture in the same way and to the same extent as an embezzlement of the property. *Law of Contracts*, title *Shipping*, vol. 2, p. 322.

### *Special contract.*

405. When during the danger a contract has been made in good faith respecting the amount of the salvage, such contract must regulate the amount, unless excessive;<sup>2</sup> in which case, it may be reduced to such amount as is proved to be reasonable.<sup>3</sup>

<sup>1</sup> The Theodore, *Swabey's Rep.*, 351; The Helen & George, *Id.*, 368; The Arthur, 6 *Law Times*, (N. S.) 556.

<sup>2</sup> *Bondies v. Sherwood*, 22 *Howard's U. S. Supreme Court Rep.*, 214.

<sup>3</sup> *A. D. Patchin*, 1 *Blatchford's U. S. Circ. Ct. Rep.*, 414; *Eads v. The H. D. Bacon*, 1 *Newberry's Adm. Rep.*, 274.

### *Amount, how fixed.*

406. The amount awarded for salvage must be fixed, in the discretion of the court, in each case, as an adequate reward, not only for the work done, and expenses incurred, but the zeal shown, the risks run, and the value of that which was saved.

It does not include, however, the costs and fees of the legal authorities, the duties and charges to which the articles saved may be liable, or the expenses of storing, preserving, valuing, or disposing of the same.

It can in no case exceed one-half the value of that which was saved.<sup>1</sup>

*German Law*, §§ 744-748.

By Article 89, salvage in the case of piracy is restricted to one-fourth.

<sup>1</sup> A moiety of the value of the vessel and cargo, in a case of the salvage of a derelict, was formerly the amount awarded, but the maritime courts now give only such amount as is proper with reference to all the circumstances of the case, including the value of the property saved, and the risk to the property of the salvors. *Kirby v. The Owners of The Scindia*, *Law Rep.*, 1 P. C., 241.

*Apportionment between several salvors.*

**407.** Where several persons have taken part in the salvage services, the amount awarded must be divided among them in proportion to the service each may have rendered, personally or with his property, or, in case the proportion can not be determined, then according to the number who are to participate.

Those who in the same casualty devoted themselves to the saving of human life, are entitled to participate equally with the others.

*German Law*, § 750.

The next section of that law provides that "when the ship or its cargo is either wholly or in part salvaged or preserved by another ship, then the amount awarded for salvage or assistance is divided between the owner, the master, and the rest of the crew of the other ship, unless it shall have been otherwise specially agreed between them, in such proportion that the owner shall take one-half, the master one-quarter, and the rest of the crew the other one-quarter. Among the latter the amount shall be divided in proportion to the pay to which each is entitled, or to which, according to his rank, he is entitled."

## TITLE XII.

## IMPOSTS.

The provisions of this Title are suggested by the provisions usual in commercial treaties between the principal commercial Powers. A number of the latter treaties entered into by France, Great Britain and the United States are specially referred to under the Articles. These citations might be extended to earlier or less important treaties. In the British Parliamentary Papers, 1866, *Accounts & Papers*, vol. LXXVI., (38,) is a return showing the then existing commercial treaties of Great Britain, and indicating which of them establish reciprocity, which contain the most favored nation clause, and which regulate or provide for an equalization of shipping dues.

ARTICLE 408. Equality in foreign commerce and navigation.

409. No unfavorable discriminations on account of national character or origin.

410. Restrictions on examination of cargo and charges.

411. Ships exempt from tonnage dues.

412. What acts not to be considered acts of commerce.

413. Computation of tonnage.

414. Exception as to fisheries, coasting trade and internal navigation.

415. Commercial travellers.

416. Duty on samples.

*Equality in foreign commerce and navigation.*

408. There shall be maintained between the territories<sup>1</sup> of all the nations reciprocal liberty of commerce and navigation to all persons and ships bearing the character of any of the nations.<sup>2</sup> And, except as provided in article 414, whatever traffic is allowed by any nation to its domestic ships, or to those of any other nation, shall be allowed, upon the same terms, to the vessels of all the other nations.<sup>3</sup>

<sup>1</sup> Treaty between the United States and the Netherlands, Aug. 26, 1852, Art. II., (10 *U. S. Stat. at L.*, 983,) expressly extends the rule of reci-



proximity, in relation to the flags of the two nations, to the colonies. So does that between Great Britain and Prussia, Aug. 16, 1865, Art. II., (*Accounts & Papers*, 1866, vol. LXXVI., (38.))

<sup>2</sup> Treaty between the United States and

The Two Sicilies, Oct. 1, 1855, Arts. VI., VIII., 11 *U. S. Stat. at L.*, 639.

<sup>3</sup> Convention between the United States and

The Dominican Republic, } Feb. 8, 1867, Art. VI., 15 *U. S. Stat. at L.*, (Tr.), 167.

Bolivia, May 13, 1858, " IV., 13 *Id.*, 1006.

Venezuela, Aug. 27, 1860, " VI., 12 *Id.*, 1146.

The Two Sicilies, } Oct. 1, 1855, " X., 11 *Id.*, 646.

By numerous French treaties, all merchandise, of which the importation or exportation is legal, may be imported or exported in foreign as well as domestic vessels. Such merchandise, imported into either nation by foreign vessels, may be delivered for consumption, transportation, or re-exportation, or stored at the disposal of the owner, or his agents, in all cases, without being subject to more burdensome conditions than those which apply to merchandise in domestic vessels.

Treaty between France and

Sweden and Norway, Feb. 14, 1865, Art. IV., 9 *De Clercq*, 172

The Free Cities of Lübeck, Bremen, & Hamburg, } Mar. 4, 1865, " VI., 9 *Id.*, 187.

Grand Duchy of Mecklenburg-Schwerin, (extended to the) Grand Duchy of Mecklenburg-Strelitz, } June 9, 1865, " VI., 9 *Id.*, 295.

Austria, Dec. 11, 1866, " IV., 9 *Id.*, 658.

Russia, June 14, 1857, " XI., 7 *Id.*, 278.

To similar effect is the treaty between France and

The Pontifical States, July 29, 1867, Art. XIV., 9 *De Clercq*, 739.

Portugal, July 11, 1866, " XX., 9 *Id.*, 558.

See, also, treaty between the United States and

Hayti, Nov. 3, 1864, Art. X., 13 *U. S. Stat. at L.*, 711.

The Ottoman Empire, Feb. 25, 1863, " VIII., 13 *Id.*, 609.

The exception in the case of coasting and internal navigation is provided for by Article 414.

*No unfavorable discriminations on account of national character or origin.*

409. No discrimination in the treatment in any respect, whether as to duties, charges, privileges, drawbacks, or otherwise, shall be made by any nation against the ships of any other nation, or their contents or traffic, in favor of those of its own national character, or those of any other nation whatsoever whether

a party to this Code or not, on account of the national character of ships or persons, or the origin of imports, or on account of the origin or destination of exports or of property in transit through the country.<sup>1</sup>

This article shall apply, without respect to the nationality of any foreign ports included in the voyage.<sup>2</sup>

<sup>1</sup> The commercial treaties provide in detail for many particulars which should seem to be comprehended in the above general principle. The scope of the special provisions of the treaties may be summarily stated as follows:

*Duties on imports.*—No higher or other duties shall be charged by either nation on the importation of goods in the vessels of the other than on the same in vessels of its own national character.

Treaty between the United States and

Nicaragua, June 21, 1867, Art. VI., 15 *U. S. Stat. at L.*, (Tr.), 59.

Dominican Republic, Feb. 8, 1867, " VI., 15 *Id.*, (Tr.), 167.

Bolivia, May 13, 1858, " IV., 12 *Id.*, 1006.

Belgium, July 17, 1858, " II.-VIII., 12 *Id.*, 1044.

Paraguay, Feb. 4, 1859, " VI., 12 *Id.*, 1094.

Venezuela, Aug. 27, 1860, " VI., 12 *Id.*, 1146.

Two Sicilies, Oct. 1, 1855, " X., 11 *Id.*, 646.

And see treaty between United States and

The Netherlands, Aug. 26, 1852, Art. III., 10 *U. S. Stat. at L.*, 983.

The treaty with The Two Sicilies, above cited, and that with Hanover, June 10, 1846, Art. III., (9 *U. S. Stat. at L.*, 859,) and with Mecklenburg-Schwerin, Dec. 10, 1847, Art. III., (9 *Id.*, 912,) forbid any priority or preference to be given to either nation, or any one on their behalf, in the purchase of articles imported, on account of the national character of the vessel.

*Duties on exports.*—No higher or other duties shall be charged, and no less bounties or drawbacks allowed, by either nation on the exportation of goods in the vessels of the other, than on the same in vessels of its own national character.

Treaties between the United States and Nicaragua, Art. VI.; Dominican Republic, Art. VI.; Bolivia, Art. IV.; Belgium, Art. VIII.; Netherlands, Art. I., above cited.

See, also, the treaty between the United States and

Hayti, Nov. 3, 1864, Art. XI., 13 *U. S. Stat. at L.*, 711.

Ottoman Empire, Feb. 25, 1862, " VIII., 13 *Id.*, 609.

By the treaty between the United States and Belgium, above, salt and the produce of national fisheries are excepted.

Merchandise of any nature and origin, exported in foreign vessels, is not liable to charges or formalities respecting the exportation, other than those to which merchandise exported by domestic vessels is liable, and is en-

titled to enjoy all rights and drawbacks or other favors which are accorded in the case of domestic vessels.

Treaty between France and

Austria, Dec. 11, 1866, Art. VIII., 9 *De Clercq*, 658.

Sweden and Norway, Feb. 14, 1865, 9 *Id.*, 172.

A similar provision is contained in the treaty between France and

Russia, June 14, 1857, Art. XIII., 7 *De Clercq*, 278.

Pontifical States, July 29, 1867, " XVI., 9 *Id.*, 739.

*Port charges.*—The vessels of one nation, from wheresoever coming, and entering, laden, or in ballast, any port of another nation, are not liable to pay in those ports, whether upon entry or exit, or during their sojourn, any other or greater charges of tonnage, pilotage, brokerage, quarantine, light-house dues, or other charges imposed upon vessels under whatever denomination, for the benefit of the State, the district, or municipal or local corporations, private individuals, or any other person or establishment, than those which are chargeable upon domestic vessels coming from the same place, and having the same destination.

Treaty between France and

Sweden and Norway, }  
(omitting some quali- } Feb. 14, 1865, Art. I., 9 *De Clercq*, 172  
fications,)

Free Cities of Lubeck, }  
Bremen and Hamburg, } March 4, 1865, " II., 9 *Id.*, 187.

Grand Duchy of Meck- }  
lenburg-Schwerin, — }  
(extended to the) Grand } June 9, 1865, " III., 9 *Id.*, 295.  
Duchy of Mecklenburg- }  
Strelitz, }

Portugal, July 11, 1866, " XVIII., 9 *Id.*, 558.

Austria, Dec. 11, 1866, " I., 9 *Id.*, 658.

Russia, June 14, 1857, " III., 7 *Id.*, 278.

To similar effect is that between France and

Pontifical States, July 29, 1867, Art. X., 9 *Id.*, 739.

Provisions for the equality of charges on vessels of both nations are also contained in the treaty between France and

San Salvador, Jan. 2, 1858, 7 *Id.*, 362.

Treaty between the United States and

The Ottoman Empire, Feb. 25, 1862, Art. IX., 13 *U.S. Stat. at L.*, 609.

And see the treaties of the United States, referred to under the paragraph above, upon "duties on imports."

Some of those treaties specify also charges for anchorage, harbor dues, buoys, clearance, salvage, and fees of public functionaries.

By the French treaties, last above cited, each nation reserves the power to impose in its own ports, on the ships of other nations, and on merchandise composing the cargo of such ships, special taxes for the service of the port.

*Facilities in port.*—Vessels of each nation are entitled to the same privileges in respect to stationing, lading and unlading, within the territory of the other, as are extended by the latter to domestic vessels.

## Treaty between Great Britain and

Colombia, Feb. 16, 1866, Art. VIII., { *Accounts and Papers*, 1867, vol. LXXIV., (36.)Belgium, July 23, 1862, " VI., *Id.*, 1863, vol. LXXIII., (45.)France, Jan. 23, 1860, " X., *Id.*, 1860, vol. LXVIII., (30.)

## Treaty between France and

Sweden and Norway, Feb. 14, 1865, Art. II., 9 *De Clercq*, 172.Free Cities of Lubeck, }  
Bremen, and Hamburg, } Mar. 4, 1865, " IV., 9 *Id.*, 187.Grand Duchy of Meck- }  
lenburg - Schwerin— }  
(extended to the) Grand }  
Duchy of Mecklenburg- } June 9, 1865, " IV., 9 *Id.*, 295.  
Strelitz, }Portugal, July 11, 1866, 9 *Id.*, 558.Russia, June 14, 1857, " VI., 7 *Id.*, 278.

By the treaty between Great Britain and Prussia, August 16, 1865, (*Accounts and Papers*, 1866, vol. LXXVI., 38,) it is provided that ships and their cargoes of each of the parties in the dominions of the other, shall be treated in every respect as national ships and their cargoes. But this stipulation does not affect the exclusive rights connected with fishery belonging to the subjects of either country, nor the local immunities enjoyed by a privileged class in Great Britain.

*Discriminating duties*—No higher or other duties shall be imposed by either nation on the importation from the other nation of articles, the growth, produce, or manufacture of the other nation, than are or shall be imposed on the like articles from any nation whatever.

## Treaty between the United States and

Nicaragua, June 21, 1867, Art. IV., 15 *U. S. Stat. at L. (Tr.)*, 59.Dominican Re- }  
public, } Feb. 8, 1867, " IX., 15 *Id.*, (*Tr.*), 167.Bolivia, May 13, 1858, " VI., 12 *Id.*, 1007.Belgium, July 17, 1858, " XIII., 12 *Id.*, 1047.Venezuela, Aug. 27, 1860, " IX., 12 *Id.*, 1148.

## And see treaty between the United States and

Paraguay, Feb. 4, 1859, Art. IV., 12 *Id.*, 1093.

By the treaty between the United States and the Netherlands, 1852, Art. V., (10 *U. S. Stat. at L.*, 985,) discriminating duties are allowed to some extent.

The treaty between Great Britain and Austria, Dec. 16, 1865, Art. VI., (*Accounts and Papers*, 1866, vol. LXXVI., 38,) provides that internal imposts which are levied in the territory of one party on the production, preparation, or use of any article, whether on account of the State, or on account of municipalities and corporations, shall under no pretext affect the productions of the other party in a higher or more onerous degree than the same productions of native origin.

Products of fisheries are also expressly mentioned as in addition to other articles of produce, growth or manufacture in the treaty between

the United States and the Dominican Republic, Art. IX.; The Two Sicilies, Art. XIV., above.

Goods in transit are included in the treaty between the United States and the Swiss Confederation, Nov. 25, 1850, Art. IX., (11 *U. S. Stat. at L.*, 592.)

*Charges on unladen cargo.*—Foreign vessels entering a port and wishing to discharge a part of their cargo may, subject to the laws and regulations of the nation, keep on board such of the cargo as is destined to another port, whether of the same country or of another, and carry it thither, without being required to pay for such part of their cargo any duties or charges save those of the service of the port, and those are chargeable only at the same rate as is fixed for domestic vessels.

Treaty between France and

Free Cities of Lubeck, Bremen and Ham- burg,	} Mar. 4, 1865, Art. X., 9 <i>De Clercq</i> , 187.
Portugal,	

Russia,	July 11, 1866, "XXVI., 9 <i>Id.</i> , 558.
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	June 14, 1857, "VII., 7 <i>Id.</i> , 278.
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By the convention between the United States and Belgium, July 17, 1858, Art. XI., (12 *U. S. Stat. at L.*, 1043,) cargo retained on the ships of one nation while in the ports of the other, and destined for any foreign country, is not subject to any charges whatever other than those for the prevention of smuggling.

*The most favored nation clause*, which is adopted between some Christian powers, as well as with uncivilized or non-Christian States, seems to be a shifting rule, not adapted to a permanent Code. Fully stated, it seems to be as follows :

"It being the intention of the two high contracting parties to bind themselves by the preceding articles, to treat each other on the footing of the most favored nation, it is hereby agreed between them, that any favor, privilege, or immunity whatever, in matters of commerce and navigation, which either contracting party has actually granted, or may hereafter grant, to the subjects or citizens of any other State, shall be extended to the subjects or citizens of the other high contracting party gratuitously, if the concession in favor of that other nation shall have been gratuitous ; or in return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional." This is the form in which it appears in the treaty between the United States and

Honduras, July 4, 1864, Art. III., 13 *U. S. Stat. at L.*, 699.

See, also, to similar effect, treaty between France and

Netherlands,	July 7, 1865, Art. XXXVIII., 9 <i>De Clercq</i> , 337.
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Free Cities of Lubeck, Bremen and Hamburg,	} Mar. 4, 1865, "XXII., 9 <i>Id.</i> , 187.
Grand Duchy of Meck- lenburg - Schwerin — (extended to the) Grand Duchy of Mecklenburg- Strelitz,	

	June 9, 1865, "XXIII., 9 <i>Id.</i> , 295.
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For the exception to the most favored nation clause in favor of frontier traffic, Federal laws, &c., see the treaty between Great Britain and Austria, Dec. 16, 1865, Art. II., *Accounts and Papers*, 1866, vol. LXXVI., (38.)

The treaty between Great Britain and Prussia, above referred to, provides for "equality of treatment with native subjects in regard to charges on loading and unloading, to warehousing and the transit trade, as also in regard to bounties, facilities, and drawbacks."

Some of the treaties are, like Article 409, much more general than the treaties above referred to. For instance, the language of the recent treaty between Great Britain and Prussia, August 16, 1865, Art. I., (*Accounts and Papers*, 1866, vol. LXXVI., 38,) is as follows :

"British ships and their cargoes shall, in Prussia, and Prussian ships and their cargoes shall, in the United Kingdom of Great Britain and Ireland, from whatever place arriving, and whatever may be their place of destination, and whatever may be the place of origin or destination of their cargoes, be treated in every respect as national ships and their cargoes.

"It is, however, agreed that the preceding stipulation shall not affect the rights connected with fishery belonging exclusively to the subjects of either country, within their respective marine territorial limits, nor the local immunities enjoyed in Great Britain not by British subjects generally, but only by certain privileged classes in certain posts."

By the treaty between the United States and The Two Sicilies, Oct. 1, 1855, Art. VI., (11 *U. S. Stat. at L.*, 643,) it is provided that the reciprocity established shall not extend to premiums which either nation may grant to their own citizens or subjects to encourage the building of ships to sail under their own flag.

<sup>2</sup> Treaty between the United States and The Two Sicilies, above cited; Bolivia, May 13, 1858, Art. IV., (12 *U. S. Stat. at L.*, 1006;) Hayti, Nov. 3, 1864, Art. XI., (13 *Id.*, 711.)

A similar provision is contained in the treaty between France and the Grand Duchy of Mecklenburg-Schwerin, (extended to the) Grand Duchy of Mecklenburg-Strelitz, June 9, 1865, Art. VIII., 9 *De Clercq*, 295.

Compare treaty between France and Russia, June 14, 1857, Art. XII., 7 *Id.*, 278.

### *Restrictions on examination of cargo and charges.*

410. Except as otherwise provided in this Code, foreign ships cannot be subjected to account for their freight, unless preparing to discharge it; nor to pay any charges, unless they enter port; and then only such as are chargeable upon domestic ships in the like cases.

Suggested by treaties between the United States and Prussia, 1785, (8 *U. S. Stat. at L.*, 84;) Bolivia, May 13, 1858, Art. III., (12 *Id.*, 1005,) which have a provision to the effect that no examination required by the laws of

either nation, of property laden in its ports on the ships of the other, can be required after the lading; and such ships shall not be searched, unless property has been clandestinely and illegally laden; in which case, the person by whose order it was carried on board, or who carried it without order, is liable to the local law; but no other person shall be molested, nor shall any other goods, nor the vessel, be detained for that cause.

It does not, however, seem desirable to recognize such a rule as of general obligation.

*Ships exempt from tonnage dues.*

411. The following ships are free from tonnage dues on entry, sojourn, or departure :

1. Public armed ships ;
2. Ships which, entering in ballast from whatever place, neither discharge ballast, nor take in freight ;
3. Ships which, passing from one port to another of the same nation, whether it be to discharge all or a part of their freight, or to lade freight, have already paid such charges ;
4. Steamships engaged in the postal service, or the transportation of travellers and their baggage, and in no other commerce ;
5. Ships which, entering a port, whether voluntarily or by stress, leave it without performing any act of commerce ;<sup>1</sup> and,
6. Pleasure yachts, the passports of which state their quality as such, and which have on board no goods subject to duty, and leave port without performing any act of commerce.<sup>2</sup>

<sup>1</sup> Subdivisions 2, 3, 4 and 5 are from the treaty between France and Portugal, July 11, 1866, Art. XXVII., (9 *De Clercq*, 558;) Sweden and Norway, Feb. 14, 1865, Art. VII., (9 *Id.*, 172.)

<sup>2</sup> The declaration between France and several other continental Powers, (7 *De Clercq*, 622, 636,) provides that such yachts are free from all duties of navigation, but requires that they carry away all persons who arrived by them.

The treaties between France and the Free Cities of Lubeck, Bremen and Hamburg, March 4, 1865, Art. IX., (9 *De Clercq*, 187;) and with the Grand Duchy of Mecklenburg-Schwerin—(extended to the) Grand Duchy of Mecklenburg-Strelitz, June 9, 1865, Art. IX., (9 *Id.*, 295,) are to similar effect, except that they do not mention steamships as above, and the first mentioned does not declare such vessels free from tax, but only puts them upon the same footing as domestic vessels.

*What acts not to be considered acts of commerce.*

**412.** The following acts in a port of refuge are not to be considered as acts of commerce, within the last article :

1. Unlading and relading merchandise for the repair or purification of the same, or of the ship ;
2. The transfer of merchandise from one ship to another, in case the former proves unseaworthy ;
3. Expenditures necessary for food and equipment ; and,
4. The sale of damaged freight, by authority of the proper revenue officers.

Treaty between France and

Sweden and Norway, Feb. 14, 1865, Art. VII., 9 *De Clercq*, 172.

Free Cities of Lubeck, }  
Bremen and Hamburg, } Mar. 4, 1865, " IX., 9 *Id.*, 187.

*Computation of tonnage.*

**413.** All tonnage dues on a foreign ship bearing a passport such as is prescribed by article 278, must be reckoned either according to the tonnage stated in the passport, or according to the mode of measurement in use in the port where the ship lies, as the master may elect.

Treaty between France and

Free Cities of Lubeck, }  
Bremen and Hamburg, } Mar. 4, 1865, Art. V., 9 *De Clercq*, 187.

Grand Duchy of Meck- }  
lenburg-Schwerin (ex- }  
tended to the) Grand }  
Duchy of Mecklen- }  
burg-Strelitz, } June 9, 1865, " V., 9 *Id.*, 295.

Austria, Dec. 11, 1866, " II., 9 *Id.*, 658.

Pontifical States, July 29, 1867, " XI., 9 *Id.*, 739.

Honduras, Feb. 22, 1856, " XI., 7 *Id.*, 10.

*Exception as to fisheries, coasting trade, and internal navigation.*

**414.** The provisions of this Title do not prevent a nation from giving to its members, or to domestic ships<sup>1</sup> of any kind,<sup>2</sup> exemptions, privileges, or exclusive rights in reference to :

1. The national fisheries, or their produce ;<sup>3</sup> or,



## 2. Domestic navigation,<sup>4</sup> as defined by article 372.

<sup>1</sup> The usual language of the treaties is, that the Articles in question *do not apply* to the coasting trade, &c. ; but it is suggested here to make the equality apply, *as between foreign ships*, reserving the right of a nation to give exclusive or other privileges to its own people and ships over all others.

See treaty between Great Britain and Prussia, Aug. 16, 1865, (*Accounts and Papers*, 1866, vol. LXXVI., 38.)

The treaty between France and the Grand Duchy of Mecklenburg-Schwerin, (extended to the) Grand Duchy of Mecklenburg-Strelitz, June 9, 1865, Art. VII., (9 *De Clercq*, 295,) provides that the vessels of either power engaged in internal navigation, shall be treated on the same footing as vessels of the most favored nations.

<sup>2</sup> Treaty between the United States and

The Two Sicilies, Oct. 1, 1855, Art. XIII., 11 *U. S. Stat. at L.* 647.

<sup>3</sup> Treaty between France and

Austria, Dec. 11, 1866, Art. IX., 9 *De Clercq*, 658.

Pontifical States, July 29, 1867, " XVII., 9 *Id.*, 739.

And other French treaties.

<sup>4</sup> Treaty between France and

Sweden and Norway, Feb. 14, 1865, Art. V., 9 *De Clercq*, 172.

Austria, Dec. 11, 1866, " V., 9 *Id.*, 658.

Pontifical States, July 29, 1867, " XIII., 9 *Id.*, 739.

### *Commercial travellers.*

**415.** No nation shall impose a license tax upon commercial travellers seeking orders or making purchases for their principals in another nation, and carrying no merchandise other than samples.

This provision is from the commercial treaty between France and Switzerland, June 30, 1864, Art. XXVI., (9 *De Clercq*, 56,) which, however, provides also, that such travellers shall be duly authorized by their own government, according to the formalities to be agreed upon between the two nations.

Treaty between France and

Austria, Dec. 11, 1866, Art. XV., 9 *De Clercq*, 646.

To very similar effect are the following:

Treaty between France and

Sweden and Norway, Feb. 14, 1865, Art. XV., 9 *De Clercq*, 151.

Portugal, July 11, 1866, " IX., 9 *Id.*, 558.

Free Cities of Lubeck, }  
Bremen and Hamburg, } Mar. 4, 1865, " XVI., 9 *Id.*, 187.

Grand Duchy of Meck- }  
lenburg - Schwerin — } June 9, 1865, " XIX., 9 *Id.*, 295.  
(extended to the) Grand }  
Duchy of Mecklenburg- }  
Strelitz, }

The treaty between France and Belgium, April 27, 1854, Art. XIX., (6 *De Clercq*, 420,) subjects commercial travellers to a tax.

For the rule adopted between France and Switzerland, see 9 *De Clercq*, 319.

The provisions of the protocol between France and The Free Cities, in reference to regulations for commercial travellers, and the importation of samples, provided for annual licenses in two forms—one for manufacturers and merchants, and the other for commercial travellers; and also for offices in each country, for the inspection and admission of samples. 9 *De Clercq*, 20.

### *Duty on samples.*

**416.** Dutiable articles, when carried as samples under the last article, shall be admitted, temporarily, free of duty. But proper security may be required for their re-exportation.

This provision is from the commercial treaty between France and Switzerland, June 30, 1864, (9 *De Clercq*, 56,) which also provides that the necessary formalities shall be regulated by agreement between the two governments.

Treaty between France and

Grand Duchy of Meck-  
lenburg - Schwerin —  
(extended to the) Grand  
Duchy of Mecklenburg-  
Strelitz,

} June 9, 1865, Art. XX., 9 *De Clercq*, 295.

Netherlands,

July 7, 1865, “ XXIII., 9 *Id.*, 337.

The regulations governing the execution of the provision for the admission of samples free of duty, and for the annual license of commercial travellers, under the treaty between France and Austria, are contained in the protocol of Dec. 11, 1866, (9 *De Clercq*, 662.)

As to the identification of samples, see also protocol to treaty between France and the Grand Duchy of Mecklenburg-Schwerin, (9 *De Clercq*, 308.)

## TITLE XIII.

## QUARANTINE.

## ARTICLE 417. Quarantine.

418. For what diseases quarantine may be imposed.

419. Detention of ships.

420. Ships may put to sea, when.

421. Limit of quarantine.

422. Regulations.

A summary of the laws and regulations of different countries on quarantine will be found in a paper by Dr. Milroy, in the *Transactions of the British National Association for the Promotion of Social Science*, 1862, p. 872.

Another paper by the same author is found in *Id.*, vol. for 1859, p. 521 ; Several conventions on this subject are to be found in 6 *De Clercq*, 141. 6 *Id.*, 179 ; 9 *Id.*, 43 ; 9 *Id.*, 383.

See, also, an account of the Quarantine Conference of Paris, in *Transactions of Nat. Asso. for Promotion of Social Science*, vol. for 1859, p. 605.

*Quarantine.*

417. Each nation, for the protection of the public health, may impose, in any ports of its territory, quarantine upon all ships, public or private, arriving from other ports, and the persons and property on board, and may impose, on any part of its land frontiers, quarantine upon any person or property about to enter, subject to the following articles of this Title.

*For what diseases quarantine may be imposed.*

418. Quarantine may be imposed for any of the following diseases, and no other, viz. : yellow fever, cholera, typhus or ship fever, small-pox, and any new disease, not now known, of a contagious, infectious, or pestilential nature.

*Detention of ships.*

419. Ships arriving in a foul and unwholesome condition, even though provided with clean bills of health, and though no case of disease has occurred during the

voyage, may be subjected to quarantine detention and purification.

*Ships may put to sea, when.*

**420.** Any ship, before breaking bulk, may put to sea, in preference to being subjected to quarantine.

*Limit of quarantine.*

**421.** Quarantine shall in no case exceed thirty days.

*Regulations.*

**422.** Subject to the foregoing articles of this Title, each nation may make and enforce such quarantine regulations as it may see fit.

## TITLE XIV.

## RAILWAYS.

**ARTICLE 423.** Line between frontier stations an international route.

424. Equal facilities to members of any nation.

425. Freedom of traffic.

426. Revenue service.

427. Offenders against either nation not to be employed by the other.

428. Goods carried in passenger trains.

429. Transit of merchandise through intermediate nation.

*Line between frontier stations an international route.*

423. Except where otherwise provided by special compact, the portion of a railway lying between the frontier stations of two nations which the railway connects is an international route. In all that concerns the surveillance of the road, the administrative control of each nation extends over the line proceeding from it to the frontier station of the other nation.

But the jurisdiction of the tribunals is not thereby extended beyond the frontier.

Suggested by the provisions of the convention for the international railway service between France and Spain, April 8, 1864, Art. I., 9 *De Clercq*, 12.

*Equal facilities to members of any nation.*

424. No distinction shall be made between the members of different nations in the price, time, or facilities of transportation; and transportation within one territory towards the other shall not be less favorably treated in those respects than that which is wholly internal.

Convention for the establishment of an international railway between France and

Belgium, Jan. 15, 1866, Art. VIII., 9 *De Clercq*, 473, 475.

Prussia, July 18, 1867, " VIII., 9 *Id.*, 736, 738.

Grand Duchy of } June 10, 1857, " II., 7 *Id.*, 274, 277.  
Luxemburg,

Bavaria, Feb. 4, 1848, " X., 5 *Id.*, 576.

The last clause of the Article is also contained in the convention between France and

Belgium, Sept. 20, 1860, Art. XI., 8 *De Clercq*, 118,

—(respecting the railways of the Ardennes and Namur.)

Belgium, Sept. 20, 1860, Art. XI., 8 *Id.*, 122,

—(respecting the railways of the Ardennes and of Luxemburg.)

### *Freedom of traffic.*

425. Subject to the following articles, trains, whether with goods or passengers, may cross the boundary at any time of the day or night, and without exception of holidays.

Convention concerning international railway service between France and

Spain, April 8, 1864, Arts. II., IX., 9 *De Clercq*, 12, 14.

Detailed provisions respecting the revenue service are found in Arts. IV., VI.-VIII., X., XI., of the convention between France and Spain, above, and in the convention between France and

Bavaria, July 3, 1857, Arts. XII-XV., 7 *De Clercq*, 229.

Sardinia, Nov. 23, 1858, 7 *Id.*, 532.

Also in the regulation of the international railway service between France and

Sardinia, Nov. 15, 1858, 7 *De Clercq*, 529.

Belgium and the } Dec. 14, 1852, 6 *Id.*, 252.  
Netherlands,

### *Revenue service.*

426. Each nation is entitled to the following facilities for its revenue and railway service, subject to the next article :

1. Each of the contiguous nations may establish and designate by its arms,<sup>1</sup> in the frontier station of the other, a revenue office, the necessary accommodation for which shall be provided by the latter nation, without charge ;<sup>2</sup>

2. Each nation may send its revenue officers in uniform, and with or without arms,<sup>3</sup> to and fro between its

territory and such office, in any train, in the compartments of the guard and carriages of the second class, without charge ;<sup>4</sup>

3. Such revenue officers, and other servants of the government, or of the railway, crossing the boundary on their service as such, are, on the production of their commissions, exempt from civil or military service, and from direct and personal taxes ; and in respect to service within the station, remain subject to the exclusive authority of the nation employing them. In other respects, they are equally subject to the local law as other persons ;<sup>5</sup>

4. Articles necessary within the territory of one nation for the service of the other, or the maintenance of its railway, or furnishing the residences of its officers and servants, are free of duty on crossing the boundary ;<sup>6</sup>

5. The revenue officers of the two nations shall respectively communicate to each other the instructions and circulars addressed to their officers respecting the service ;

6. The administration of each railway must notify to the revenue officers, at least eight days in advance, changes proposed in the time tables ; but special and extraordinary trains may be sent at any time, twelve hours' notice in advance being given of freight trains ;<sup>7</sup>

7. Officers and agents of each nation, and its railway, must respectively render to those of the other all reasonable co-operation in respect to international transportation, and the prevention and detection of frauds on the revenue, subject to the regulations of their own law.<sup>8</sup>

<sup>1</sup> Convention concerning the international railway service between France and

Spain, April 8, 1864, Art. XVII., 9 *De Clercq*, 12, 15.

And to similar effect, convention between France and Sardinia, Nov. 23, 1858, Art. III., 7 *De Clercq*, 532.

Bavaria, July 3, 1857, " III., 7 *Id.*, 299.

<sup>2</sup> Convention between France and

Spain April 8, 1864, Art. XIV., 9 *De Clercq*, 12, 15.

<sup>3</sup> Convention between France and Bavaria, July 3, 1857, Arts. IV., V., 7 *De Clercq*, 299, —which also provides that “Ils seront dispensés des prescriptions de police sur les passe-ports.”

<sup>4</sup> Convention between France and Spain, April 8, 1864, Art. V., 9 *De Clercq*, 12.

<sup>5</sup> Convention between France and Bavaria, July 3, 1857, Art. VI., 7 *De Clercq*, 299, 301.

<sup>6</sup> Convention between France and Spain, April 8, 1864, Art. XIX., 9 *De Clercq*, 12, 16.

Regulation of the international service of railways between France and

Sardinia, Nov. 15, 1858, Art. XVIII., 7 *De Clercq*, 529, 531.

Belgium and } 1848, “ XXIV., 5 *Id.*, 618.  
Prussia, }

<sup>7</sup> Convention between France and Spain, April 8, 1864, Art. XVIII., 9 *De Clercq*, 12, 15.

Bavaria, July 3, 1857, “ XXX., 7 *Id.*, 299, 304.

The latter adds ; “ sans peine d’être tenues de remplir a la frontiere les formalities ordinaires de douane.”

To the same effect are the regulations for international railway service between France and

Belgium and the } Dec. 14, 1852, Art. XIX., 6 *De Clercq*, 252.  
Netherlands, }

Belgium and Prussia, } 1848, “ XIX., 5 *Id.*, 618.

<sup>8</sup> Convention between France and Bavaria, July 3, 1857, Art. X., 7 *De Clercq*, 299, 301.

Sardinia, Nov. 3, 1858, “ XI., 7 *Id.*, 532, 534.

*Offenders against either nation not to be employed by the other.*

**427.** A nation is not bound to permit the entry upon or service within its territory, under this Title, of an officer or agent who has been convicted in its tribunals of any offense whatever.

Convention between France and

Bavaria, July 3, 1857, Art. VIII., 7 *De Clercq*, 299, 301.

Sardinia, Nov. 23, 1858, “ XVI., 7 *Id.*, 532, 534.

*Goods carried in passenger trains.*

**428.** Passengers are not entitled to take in the carriages goods, or packages containing goods, subject to duty, or prohibited.<sup>1</sup>

Articles subject to duty, carried in passenger trains, may be subjected to the regulations for goods on freight



trains, except that they must be passed without more than three hours' delay.<sup>2</sup>

<sup>1</sup> Convention between France and

Spain, Apr. 8, 1864, Art. XII., 9 *De Clercq*, 12, 15.

Bavaria, July 3, 1857, " XXVI., 7 *Id.*, 299, 301.

Regulation of international railway service between France and

Sardinia, Nov. 15, 1858, Art. IX., 7 *De Clercq*, 529.

Belgium and the } Dec. 14, 1852, " XIII., 6 *Id.*, 252.  
Netherlands,

Belgium and Prus- } 1848, " XIII., 5 *Id.*, 618.  
sia,

<sup>2</sup> Convention between France and

Spain, April 8, 1864, Art. XIII., 9 *De Clercq*, 12, 15.

To similar effect, without the last clause, convention between France and

Bavaria, July 3, 1857, Art. XXVII., 7 *De Clercq*, 303.

Sardinia, Nov. 15, 1858, " X., 7 *Id.*, 529.

Belgium and the } Dec. 14, 1852, " XIV., 6 *Id.*, 252.  
Netherlands,

Belgium and Prus- } 1848, " XIV., 5 *Id.*, 618.  
sia,

*Transit of merchandise through intermediate nation.*

**429.** Wagons, cars, or packages of merchandise, sealed by the revenue officers of one nation for international railway transportation, and passing through the territory of another nation, in course of such transportation, into the territory of a third nation, shall be treated as having been directly imported, if the seals and enclosures remain unbroken upon entering the latter, and if the transportation has been conformable to the regulations of the service. The casual breaking of the enclosures during transportation shall not affect the application of this article, if the cause, and the acts done in consequence thereof, be certified by the local authorities, and a new seal be imposed by them.

Treaty between France and

Switzerland, June 30, 1864, Art. V., 9 *De Clercq*, 49.

Similar provisions in treaty between France and

Netherlands, Art. X., 9 *De Clercq*, 337.

Portugal, July 11, 1866, " XXIV., 9 *Id.*, 558,

—require the wagons or packages to be "plombés," and do not contain the clause relative to compliance with the conditions of the international service.

## TITLE XV.

## TELEGRAPHS.

**ARTICLE 430. Free communication allowed.**

- 431. Right of corresponding.
- 432. Classification of dispatches.
- 433. Dispatches of State.
- 434. Authentication of dispatches of State.
- 435. Authentication of private dispatches.
- 436. Language of dispatches.
- 437. Dispatches in cypher.
- 438, 439. Preference of dispatches.
- 440. Designation of route.
- 441. Government scrutiny relinquished.
- 442. Illegal dispatches.
- 443. Suspension of service.
- 444. Sending false dispatches ; violating dispatches, &c.
- 445. Regulations.

In November, 1869, the Secretary of State of the United States, by direction of the President, addressed a circular to the principal maritime powers, inviting a conference to form a joint convention for the protection of submarine cables.

The objects proposed were : 1, to make willful or wanton destruction of them punishable as piracy ; 2, to encourage future constructions, by forbidding exclusive concessions, except on consent of both nations concerned ; 3, to forbid government scrutiny at either end of a line.

The provisions of the Draft Convention proposed are embodied in substance, in the following Articles, with some modifications, suggested by the European International Convention at Vienna, July 21, 1868.

The crime of injuring telegraphs is provided for by Article 83, and their immunity in war, by provisions in the Book on WAR.

*Free communication allowed.*

**430.** Any person may land a submarine telegraphic cable on the shores of any nation, and work the same, subject to the provisions of this Title, and the regulations made by such nation relative thereto, and subject to the rights and obligations attaching to private property.

The united consent of the several parties to the Code, must, of course, be obtained before any legislation interfering with this right.

The American Draft Convention, Arts. I. and II., proposes to recognize the principle that no exclusive concession for an international telegraphic line shall be made or renewed by any nation, without the consent of the nation with whose territory the concession contemplates a connection ; and that no telegraphic line shall be laid immediately connecting the territories of different nations, without the consent of each nation.

But it seems reasonable that all restrictions in this regard should be removed, and that the right of any persons having riparian access, to communicate through the sea, should be declared.

*Right of corresponding.*

**431.** All persons, without discrimination, have the right to correspond by international telegraphs.

Convention of Vienna, 1868, Art. I.

*Classification of dispatches.*

**432.** Telegraphic dispatches are of three classes :

1. Dispatches of State ;
2. Dispatches relating to the telegraphic or postal service of the nations uniting in this Code ;
3. Private dispatches.

Convention of Vienna, 1868, Art. IV.

*Dispatches of State.*

**433.** Dispatches of State include those that issue from the chief executive office of a nation, from the ministers, from commanders of military or naval forces, from public agents mentioned in article 91, and messages in extradition ; and also, the replies to such dispatches, except that dispatches of consuls and commissioners who are engaged in commerce, are not considered dispatches of State, unless addressed to an official person, and upon official business.

Convention of Vienna, 1868, Art. IV., modified by adding "messages in extradition."

It should seem necessary to include dispatches relating to the postal service in the second class, mentioned in Article 432, as the postal service is hardly less important than the telegraphic.

*Authentication of dispatches of State.*

**434.** Dispatches of State will be received as such only when bearing the seal, or other evidence of the authority of the sender.

Convention of Vienna, 1868, Art. V.

*Authentication of private dispatches.*

**435.** The sender of a private dispatch may be required to prove its signature.

Convention of Vienna, 1868, Art. VI.

*Language of dispatches.*

**436.** A dispatch may be written by the sender in the language of any of the nations, parties to this Code, or in any language that can be transmitted by telegraph.

The Convention of Vienna, (Art. VII.,) allows any of the languages used in the territories of the contracting States, and also Latin.

*Dispatches in cypher.*

**437.** Dispatches of State and of the telegraphic service may be written and transmitted in cypher, or secret letters, in whole or in part.

Private dispatches may be so written and transmitted, subject to the power of any nation to prohibit such dispatches from originating or being delivered within its territory.

Convention of Vienna, 1868, Arts. VIII., IX.

*Preference of dispatches.*

**438.** Subject to the next article, the transmission of dispatches shall be made in the following order :

1. Dispatches of State ;
2. Dispatches on telegraphic service ;
3. Private dispatches.

Telegraphic Convention of Vienna, 1868, Art. X.

*The same.*

**439.** A dispatch commenced cannot be interrupted, to give place to a communication of superior class, unless in case of absolute necessity.

Dispatches of the same class and with the same destination must be transmitted by the original sending station, in the order of their deposits by the senders, and by the intermediate officers in the order of their reception.

Convention of Vienna, 1868, Art. XII.

By a convention between France and Great Britain, Feb. 1, 1855, for a telegraph from Bucharest to Varna, it was provided that for messages

arriving simultaneously, the rule of the alternat should be followed.  
6 *De Clercq*, 493.

It has been proposed to allow the companies to depart from the provisions of this Article, in the interest of their service, on lines connecting several places separated by considerable difference of time in longitude.

*Designation of route.*

**440.** The sender of a message may designate its route, subject to the power of the telegraphic administration to depart therefrom, if required by the exigencies of the service, or by the instructions of the nation whose territory is traversed.

Convention of Vienna, 1868, Art. XII.

*Government scrutiny relinquished.*

**441.** The proprietors of international telegraphic lines may receive, transmit, and deliver messages, without interference or scrutiny by the government of either nation, except as provided in the next two articles.

American Draft of Convention, Art. III.

*Illegal dispatches.*

**442.** A nation may authorize and require the telegraphic administration within its territory to stop the transmission of any dispatch of either class which appears to be dangerous to the security of such nation, or is contrary to its laws, to public order, or to good morals, under the obligation to give immediate notice, in the case of a dispatch of the second or third class, to the administration from whose bureau the dispatch originated ; and in the case of a dispatch of the first class, to both parties to the correspondence.

Telegraphic Convention of Vienna, 1868, Art. XIII., modified by including public dispatches, and requiring notice to the parties.

*Suspension of service.*

**443.** A nation may suspend the service, within its territory, of all or any of the international telegraphic lines connecting therewith, for any time limited or unlimited, either by a general suspension, or for special kinds of correspondence, under the obligation to notify the suspension immediately to all the other nations uniting in this Code.

Convention of Vienna, 1868, Art. XIV.

*Sending false dispatches ; violating dispatches, &c.*

444. The following, when affecting the international telegraphic service, are public offenses :

1. Willfully originating, and tendering, or causing to be sent, false messages ;

2. Unlawfully hindering or delaying, by any act or omission, the transmission or delivery of a dispatch ; and,

3. Violating the secrecy of a dispatch, except disclosing illegal dispatches, in the cases and to the extent necessary in the enforcement of article 442, and knowingly republishing, without authority, any dispatch the secrecy of which has been so violated.

This Article is intended to protect against wrongs which have not been adequately provided for.

*Regulations.*

445. Each nation shall make regulations to assure secrecy, accuracy, and rapidity in the transmission of dispatches, and communicate the same to each of the other nations, but is not otherwise responsible for the telegraphic service.

Convention of Vienna, 1868, Arts. II., III., adding "accuracy," and also adding the clause requiring communication of the regulations.

## TITLE XVI.

## POSTAL SERVICE.

CHAPTER XXXVI. CORRESPONDENCE.  
XXXVII. POSTAL MONEY ORDERS.

## CHAPTER XXXVI.

## CORRESPONDENCE.

- ARTICLE** 446. Exchange of correspondence.  
447. Classes of correspondence.  
448. Rates of postage on letters.  
449. Rates on other postal packets.  
450. Registered correspondence.  
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467. Letters with contraband goods.  
468. Violations of the mails.

Since the first edition of this work, a general postal treaty has been entered into between the United States, Germany, Austro-Hungary, Belgium, Denmark, Egypt, Spain, France, Great Britain, Greece, Italy, Luxemburg, Sweden and Norway, Holland, Portugal, Russia, Roumania, Servia, Switzerland and Turkey.

The first article of the treaty is as follows:

“The countries between which the present treaty is concluded, shall form, under the title of ‘General Postal Union,’ a single postal territory for the reciprocal exchange of correspondence between their post offices.”

In place, therefore, of repeating here the articles of the first edition, with references to the various treaties then existing, the following articles of this chapter, excepting the last seven, are introduced, and are intended to be conformable in substance to the permanent provisions of the new treaty.

### *Exchange of correspondence.*

**446.** There shall be an exchange of correspondence between the nations, by their respective post departments; which may include correspondence originating in or destined for any country whatever to which any of the nations serve as intermediaries.

The post department of each nation shall notify to that of every other nation the countries to which it serves as intermediary.

### *Classes of correspondence.*

**447.** Subject to the provisions of this Chapter, such correspondence may include any matter of the following classes:

1. Letters, ordinary and registered:

2. Postal cards; newspapers; books, bound or stitched; prints of all kinds, comprising maps, plans, engravings, drawings, photographs, lithographs, and all other like productions of mechanical processes; legal or commercial documents; pamphlets; visiting cards; notices and papers of every kind, whether printed, engraved, lithographed or autographed; sheets of music; patterns or samples of merchandise, including grains and seeds, not having a commercial value.

### *Rates of postage on letters.*

**448.** The rate of postage on letters is twenty-five centimes for a single prepaid letter. A letter which does not



exceed fifteen grammes in weight is considered a single letter. The charge upon letters exceeding that weight is a single rate for every fifteen grammes or fraction of fifteen grammes.

The charge on unpaid letters is double that levied in the country of destination on prepaid letters. Postal cards must be prepaid. The postage upon them is one-half of that on paid letters, with power to raise the fractions to units.

For all conveyance by sea of more than three hundred nautical miles, there may be added to the ordinary postage an additional charge, not to exceed the half of the general rate for a paid letter.

*Rates on other postal packets.*

**449.** The charge for the transmission of any other postal packet, that is, of any of the matters enumerated in Article 447, other than letters, is seven centimes for each single packet.

A packet which does not exceed fifty grammes in weight, is considered a single one. The charge upon packets exceeding that weight is a single rate for every fifty grammes or fraction of fifty grammes.

For all conveyance by sea of more than three hundred nautical miles, there may be added to the ordinary postage an additional charge, not exceeding the half of the general rate fixed for packets of this class.

The maximum weight of the packets is two hundred and fifty grammes for patterns of merchandise, and one thousand grammes for the others.

The Government of any country may refuse to convey over its territory or to deliver packets specified in this Article, with regard to which the laws and regulations which determine the conditions of their publication and circulation have not been observed.

*Registered correspondence.*

**450.** The letters and packets specified in Article 447 may be registered. Every registered packet must be prepaid. The postage payable on registered letters and

packets, is the same as that on those not registered. The charge to be made for registration and for return receipts must not exceed that made in the interior service of the country of origin.

In case of the loss of a registered letter or packet, except from overruling necessity, there shall be paid an indemnity of fifty francs to the sender, or, at his request, to the person addressed, by the office of the country in the territory or in the maritime service of which the loss has occurred,—that is to say, where the trace of the article has been lost,—unless, according to the legislation of such country, the office is not responsible for the loss of registered matter sent through its interior post. The payment of this indemnity shall be made with the least possible delay, and, at the latest, within a year from the time of application. And all claim for indemnity is excluded if it be not made within a year from the time when the registered letter or packet was posted.

*Prepayment required.*

451. Prepayment of postage can be made only by means of postage-stamps, or stamped envelopes valid in the country of origin. Newspapers and other printed papers unpaid or insufficiently paid shall not be forwarded.

Other matter when unpaid or insufficiently paid shall be charged as unpaid letters, after deducting the value of the stamped envelopes or postage-stamps (if any) employed.

*Interior postage.*

452. No additional postage shall be charged for the re-transmission of letters or packets within the interior of a country. But in case a letter or packet which has only passed through one of the countries should, by being re-directed, have to pass through another, the post office of the country of destination may add its interior rate.

*Certain official correspondence free.*

453. Official correspondence relative to the postal service is exempt from postage. With this exception, no franking or reduction of postage is allowed.

*Accounts.*

454. Each office shall keep the whole of the sums which it collects by virtue of the foregoing Articles 448, 449, 450, 451, and 452. Therefore no accounts in respect to those need be kept between the several offices of the service.

Neither the senders nor the receivers of letters and other packets shall be called upon to pay, either in the country of origin or in that of destination, any tax or duty other than those prescribed in this chapter.

*Right of transit.*

455. The right of postal transit is guaranteed throughout the entire territory of the parties hereto. There shall be full liberty of exchange, the several post offices of the service having the right to send reciprocally, in transit through intermediate countries, closed mails, as well as correspondence in open mails, according to the wants of the traffic and the exigences of the service.

Closed mails and correspondence sent in open mails must always be forwarded by the most rapid routes at the command of the post offices concerned.

When several routes offer the same advantages of speed, the despatching office may choose the route to be adopted.

Closed mails must be made up whenever the number of letters and packets would otherwise, in the judgment of those in charge of the transit office, hinder its operations.

The despatching office shall pay to the office providing the transit the sum of two francs per kilogramme for letters, and twenty-five centimes per kilogramme for the several packets specified in Article 449, net weight, whether the transit takes place in

closed mails or in open mails. This payment may be increased to four francs for letters, and to fifty centimes for the packets specified in Article 449, when a transit is provided of more than seven hundred and fifty kilometres in length over the district of one office. It is understood, however, that in any case in which the transit is already actually gratuitous or subject to lower rates, those conditions shall be maintained.

Whenever a transit shall take place by sea over a distance exceeding three hundred nautical miles, the office, by or at the expense of which this sea-service is performed, shall have the right to payment of the expenses attending the transport. The expense shall be reduced as much as possible. The payment which the office providing the sea conveyance may claim on this account from the despatching office shall not exceed six francs fifty centimes per kilogramme for letters, and fifty centimes per kilogramme for the packets specified in Article 449, (net weight.) In no case shall these expenses be higher than those now paid, and no payment shall be made upon the sea routes on which nothing is paid at the present time.

In order to ascertain the weight of the correspondence forwarded in transit, whether in closed mails or in open mails, there shall be taken, at periods which shall be determined upon by common consent, an account of such correspondence during two weeks. Until revised, the result of that account shall serve as the basis of the accounts of the post offices between themselves.

Each office may demand a revision :

1. In case of any important modification in the direction of the correspondence ;
2. At the expiration of a year after the date of the last account.

The provisions of the present article are not applicable to the Indian mail, nor to the mails conveyed across the territory of the United States of America by the

railways between New York and San Francisco. Those services shall continue to form the object of special arrangements between the post offices concerned, subject to articles 465 and 466.

*Relations with other countries.*

**456.** The relations of the nations parties hereto with other nations on the subject of this Chapter shall be regulated by the separate conventions which now exist or which may be concluded between them.

The rates of postage chargeable for the conveyance beyond the jurisdiction of the nations parties hereto shall be determined by those conventions, and they shall be added in such case to the rates prescribed in this chapter.

In conformity with the stipulations of Article 454, the rate shall be apportioned in the following manner:

1. The despatching office shall keep the whole of the rate for the prepaid correspondence addressed to foreign countries ;

2. The receiving office shall keep the whole of the rate for the unpaid correspondence originating in foreign countries ;

3. The office which exchanges closed mails with foreign countries shall keep the whole of the rate for the paid correspondence originating in foreign countries, and for the unpaid correspondence addressed to foreign countries.

In the cases mentioned in subdivisions 1, 2, and 3, of this article, the office which exchanges the mails is not entitled to any payment for transit. In all the other cases the transit rates shall be paid according to the stipulations of Article 455.

*Domestic regulations.*

**457.** The post offices of the various countries may establish for themselves regulations, in respect to the order and detail necessary to the execution of this chapter. But it is understood that these regulations

may always be modified by the common consent of the offices of the general service.

The several offices may make amongst themselves arrangements on subjects which do not concern the service generally ; such as the regulations of exchange at the frontier, and the determination of limited circles in adjacent countries within which a lower rate of postage may be taken.

*Internal regulations.*

**458.** The provisions of this chapter shall not involve any alteration in the interior postal legislation of any nation, or any restriction on its right to maintain and to conclude treaties, as well as to maintain and establish more restricted postal unions, with a view to a progressive improvement of postal relations.

*Central office.*

**459.** There shall be organized, under the name of the international office of the general postal service, a central office, which shall be conducted under the supervision of a postal administration to be chosen by the conference of delegates hereinafter mentioned, and the expenses thereof shall be borne by all the offices of the general service. The general office shall be charged with the duty of collecting, publishing, and distributing information of every kind which concerns the international postal service ; of giving, at the request of the parties concerned, opinions upon questions in dispute ; of making known proposals for modifying the detailed regulations ; of notifying alterations adopted ; of facilitating operations relating to international accounts, especially in the cases referred to in Article 455, and in general of considering all questions in the interest of the postal service.

*Arbitration in case of disagreement.*

**460.** In case of disagreement between two or more parties, as to the interpretation of this chapter, the question in dispute shall be decided by arbitration.

To that end, each of the parties concerned shall choose another party, not interested in the disagreement. The decision of the arbitrators shall be given by an absolute majority of votes. In case of an equality of votes the arbitrators shall choose some other party as umpire.

*Conference every three years.*

**461.** Every three years at least, a conference of delegates from the nations parties hereto shall be held, with a view of perfecting the postal service, and discussing matters of common concern. In this conference each nation shall have one vote, and each may be represented either by one or several delegates, or by the delegation of another nation, but no delegate can represent more than two nations at a time.

*Free entry and departure of mail ships.*

**462.** Subject to the sanitary, police, and customs regulations of the port, mail ships may enter and leave the ports which they serve, at any hour of the day or night, and may leave and take mails in the roads or at the entrance of the harbors, without anchoring, or otherwise.

*Private mails forbidden.*

**463.** Sending or carrying mail matter for hire from one nation to another, except for the post department of a nation, is a public offense, unless payment of postage to that department be first made; and the government of any nation may require mail matter carried either gratuitously or for hire to be surrendered to its post department.

*Dangerous substances.*

**464.** No person shall post anything containing explosive or other dangerous substances.

*Transit of closed mails through each nation.*

**465.** The post department of each nation shall grant to the post department of every other nation the transit through its territory, and conveyance by its usual

means of mail transportation, whether by land or sea, and at the usual cost of transportation, of the closed mails exchanged in either direction between the latter and any country to which the former may serve as intermediary. But the transfer of a closed mail from one ship to another, without expense to the post department of the place, is not to be deemed a territorial transit, nor subject to postal charges by such department.

*Mail matter not to be detained*

**466.** Subject to the next article, all correspondence posted in one country for another, or received in one country from another, is free from all detention or inspection, and shall be forwarded by the most speedy means to its destination, or promptly delivered to its address, as the case may be; being subject, in its transmission, to the laws and regulations of each country respectively.

*Letters with contraband goods.*

**467.** Any correspondence suspected to contain contraband goods, may be opened and examined in presence of the party to whom it is addressed; and if, on such examination, contraband goods are discovered, the letter and its contents may be detained.

*Violations of the mails.*

**468.** The unlawful hinderance of the international postal service, or interference with, or appropriation of any correspondence entrusted thereto, or violation of the secrecy of such correspondence, is a public offense.

The following regulations accompanied the treaty :

DETAILED REGULATIONS for the execution of the Treaty concerning the formation of a General Postal Union, concluded at Berne, the 9th October, 1874.

I. *Rates of Postage within the Union.*—The Post Offices composing the Union shall communicate reciprocally the rates of postage which they shall have adopted in conformity with Articles 3, 4, and 5 of the Treaty, for paid and unpaid letters, and for the other paid articles originating in



and addressed to the Union, as well as the transit rates applicable to the land and sea services within the Union, by virtue of paragraphs 6, 7, 9, and 10 of Article 10 of the Treaty. Every modification adopted hereafter in the amount of those rates shall be notified without delay.

II. *Exchange in Closed Mails.*—The exchange of correspondence in closed mails between the Post Offices of the Union shall be regulated by common consent and according to the necessities of the service between the Post Offices concerned. If an exchange of mails should take place through the medium of one or of several other countries, due notice shall be given to the Post Offices of those countries.

III. *Application of the Stamps.*—1. The correspondence to be reciprocally exchanged shall be impressed, on the upper part of the address with a stamp indicating the place of origin and the date of posting.

2. Unpaid or insufficiently paid correspondence shall, in addition, be impressed with the stamp "T" (tax to be paid), the application of which shall devolve upon the office of the country of origin.

3. Registered articles shall bear the impression of the special stamp used for articles of a like nature in the country where they originate.

4. The several Post Offices shall forward to each other, through the medium of the International Office, an impression of the stamp last mentioned.

5. Every postal packet which does not bear the stamp "T" shall be considered as paid to destination and treated accordingly, unless there be an obvious error.

IV. *Indication of the Number of Rates.*—1. When a letter or other postal packet shall be liable, by reason of its weight, to more than a single rate of postage, the dispatching office shall indicate in the upper left-hand corner of the address, in ordinary figures, the number of rates paid, or to be paid.

2. This regulation shall not be obligatory in the case of correspondence fully prepaid addressed to a country of the Union.

V. *Insufficient Prepayment.*—1. When an article shall be insufficiently prepaid by means of postage stamps, the dispatching office shall indicate in figures, in black ink, placed by the side of the postage stamps, their total value. That value shall be expressed in francs and centimes.

2. In case postage stamps may be used which are not of any value in the country of origin, no account shall be taken of them. This fact shall be indicated by the figure "0" placed by the side of the postage stamps.

3. The office of the country of destination shall charge the insufficiently paid articles with the amount of the deficient postage, calculated at the rate of an unpaid letter of the same weight. In case of need, fractions may be raised to the monetary unit of charge in force in the country of destination.

**VI. Letter Bills.**—1. The letter bills for the direct exchanges between two Post Offices shall be in conformity with the specimen A. appended to the present regulations.

2. No mention shall be made in the letter bill of the correspondence of any kind, whether paid, unpaid, or insufficiently paid, originating in one country of the Union and addressed to another of those countries, nor of the paid correspondence from foreign countries addressed to the Union, or of the unpaid correspondence from the Union addressed to foreign countries.

3. As regards other correspondence, there shall be entered,—

1st. Under table I., the total amount of the foreign postages due on the unpaid correspondence, and the amount of the claims on the correspondence retransmitted, for which credit will have to be given to the dispatching Office.

2nd. Under table II., the total amount of the postages, and, when necessary, the foreign fees for registration, upon the paid correspondence, which will have to be credited to the Office of destination, or to the furthest Office of the Union.

4. The postages or claims to be entered in table I. shall be indicated upon each article, in *blue* ink, at the lower left-hand corner of the address.

5. The postage and fees to be brought to account under table II. shall be indicated in each article, in *red* ink, at the lower left-hand corner of the address.

6. In table III. shall be entered, with such details as this table requires, the closed mails in transit which accompany the direct mails.

7. The registered correspondence shall be entered in table No. IV. of the letter bill, with the following details: the name of the office of origin, the name of the addressee and the place of destination, or simply the name of the office of origin and the number given to the article at that office; the amount of the postage and the foreign registration fees to be credited, when necessary, to the Office of destination or the furthest Office of the Union.

8. When the number of registered articles usually sent from one office of exchange to another shall require it, a special and separate list shall be used to take the place of table No. IV. of the letter bill.

9. The amount of postages, credits, and debits shall be expressed in francs and centimes.

10. If, in order to facilitate operations of account, it should be deemed necessary in certain cases to adopt new articles under tables I. and II. of the letter bill, the necessary steps may be taken after an understanding between the Post Offices concerned. In such case, the forms of accounts shall be made to correspond with the wording of the letter bills.

**VII. Despatch of registered Correspondence.**—1. The registered correspondence shall be enclosed in a separate packet, which must be suitably made up and sealed so as to preserve its contents.

2. This packet, with the letter bill round it, shall be placed in the centre of the mail.

VIII. *Making up the Mails*.—1. Every mail exchanged between offices of the Union, after having been first tied with string, must be enclosed in strong paper of sufficient quantity to prevent damage to the contents, then tied again with string on the outside, and sealed with wax or fastened by means of a gummed paper label bearing an impression of the seal of the office. The mail must be furnished with a printed address bearing in small characters the name of the despatching office, and in larger characters the name of the office to which it is to be forwarded: "From . . ." "For . . ."

2. If the size of the mail should require it, it must be enclosed in a bag properly closed and sealed.

3. The bags must be returned to the despatching office by the next mail.

IX. *Verification of the Mails*.—1. The exchanging office which shall receive a mail shall, in the first place, ascertain whether the entries in the letter bill (debits, credits, closed mails in transit, registered articles) are correct.

2. If it discovers errors or omissions, it shall immediately make the necessary corrections on the letter bills or lists, taking care to strike out the erroneous entries with a pen, in such a manner as to let the original entries be seen.

3. These corrections shall be made by two officers. Except in the case of an obvious error, they shall be accepted in preference to the original statement.

4. A note of verification, in conformity with the specimen B. hereto annexed, shall be prepared by the receiving office, and sent without delay, officially registered, to the despatching office.

5. The latter, after examination, shall return it with any observation to which it may give rise.

6. In case of the failure of a mail, of a registered article, or of a letter bill, the circumstance shall be immediately recorded in the manner agreed upon by two officers of the receiving office, and reported to the despatching office by means of the note of verification; and, if needful, the latter shall also be advised thereof by telegram.

7. In case the receiving office shall not have forwarded by the first mail to the despatching office a note of verification, reporting errors or irregularities of any kind, the absence of that document shall be regarded as evidence of the due receipt of the mail and of its contents, until proof to the contrary.

X. *Registered Articles*.—*Conditions as to Form and Manner of Fastening*.—No stipulation is insisted upon as to the form or manner of fastening of registered articles. Each Office shall have the right to apply to such description of correspondence the regulations in force in its interior service.

*XI. Newspapers and Printed Papers.—Conditions as to Form.*—1. In order to enjoy the reduced postage extended to them by Article 4 of the Treaty, books, newspapers, printed papers and other similar articles must be placed under band, or in an envelope, open, or simply folded so as to admit of their being easily examined; and, except in the following particulars, they must contain no MS. writing, figure, or mark whatever.

2. Proofs of printing or of music may bear corrections, made with a pen, relating exclusively to the text or to the execution of the work. It shall be allowable to annex the manuscripts to them.

3. Circulars, notices, &c., may bear the signature of the sender, with his trade or profession, and may also indicate the place of origin and the date.

4. Books shall be admitted with a manuscript dedication or a complimentary inscription from the author.

5. It shall be permitted to mark with a simple stroke the passages in the text to which it is desired to call attention.

6. Printed, lithographed, or autographed stock and share lists, prices current, and market reports shall be admitted with the prices added in writing or by means of any impression whatever.

7. There shall not be admitted any other MS. additions, nor even those produced by means of typographical characters, if the latter tend to take from the packet its general character.

8. Such of the above-mentioned articles as shall not fulfil the foregoing conditions shall be considered as unpaid letters and charged accordingly, with the sole exception of newspapers and printed papers, such as circulars, notices, &c., which shall not be forwarded in such cases.

*XII. Patterns of Merchandise.—Conditions of Form.*—1. Patterns of merchandise shall only be admitted to the benefit of the reduced postage which is extended to them by Article 4 of the Treaty under the following conditions:

2. They must be placed in bags, or in boxes, or envelopes removable so as to admit of an easy examination.

3. They must not have any salable value, nor bear any MS. writing other than the name or the trade or profession of the sender, the address of the person for whom the packet is intended, a manufacturer's or trade-mark, numbers and prices.

4. It is forbidden to introduce these articles into a letter, or into a packet of any other kind, save in the case in which they form an integral part of a particular work.

5. Patterns which are not in accordance with the requisite conditions shall be charged as letters, except those which are valuable. The latter shall not be forwarded, nor those the conveyance of which would be attended with risk or danger.

*XIII. Legal and Commercial Documents.*—1. The following articles shall be considered as legal and commercial documents, and admitted as such to the reduced postage conferred by Art. 4 of the Treaty; acts or deeds of all kinds drawn up by public functionaries, invoices the various

documents on the service of insurance companies, copies or extracts of deeds under private seal written upon stamped or unstamped paper, scores or sheets of MS. music, and in general all MS. papers and documents which have not the character of an *actual* and *personal* correspondence.

2. Commercial and legal documents must be sent under a movable band, and made up so as to admit of their being easily examined.

3. Packets which do not fulfil the conditions above enumerated shall be considered as unpaid letters and charged accordingly.

XIV. *Correspondence with Foreign Countries.*—1. The Offices of the Union which have regular relations established with countries situated beyond the Union shall admit all the other Offices to take advantage of those relations for the exchange of their correspondence, on payment of the charges due for the conveyance beyond the limits of the Union.

2. They shall, consequently, furnish the Offices interested, with a table similar to the specimen C. appended to the present Regulations, which shall indicate the conditions as to payment under which may be exchanged the correspondence to be sent or received by the said routes.

3. Due notice shall be given of any alterations introduced into those conditions.

XV. *Misdirected Correspondence.*—Missent articles of all kinds shall be re-forwarded without delay to their destination by the most direct route, subject, where the case occurs, to a charge or claim of the amounts for which they may have been originally brought to account.

XVI. *Undelivered Correspondence.*—1. The correspondence which shall not be delivered, from whatever cause, shall be returned immediately through the respective offices of exchange.

2. Returned letters shall be tied up separately, and inscribed with a label bearing the words "Returned letters."

3. Those articles which shall have been paid shall be returned without any claim.

4. Unpaid or insufficiently paid letters shall, in like manner, be returned without claim, in so far as they may have originated in a country of the Union.

5. Those which may have been charged with foreign rates shall be entered to the credit of the Office which returns them. (Table No. I. of the Letter Bill.)

XVII. *Accounts.*—1. Each Office shall prepare monthly, for each mail received, a statement similar to the specimen D. appended to the present Regulations, comprising the correspondence brought to account on the letter bills received.

2. Those statements shall afterwards be incorporated in an account similar to the specimen E.

3. The account, accompanied by the statements and the letter bills (from which table IV. shall be detached), shall be submitted to the ex-

amination of the corresponding Office during the month following that to which it relates.

4. The monthly accounts, after having been mutually examined and accepted, shall be included in a quarterly general account to be prepared by the Office of that one of the two countries which shall be placed first in alphabetical order, in the absence of any other arrangement on this point which may be adopted by the Offices interested.

5. These several accounts shall be drawn up in francs and centimes.

6. The balance resulting from the general account shall be paid to the country to which it is due in francs in cash, by means of bills drawn upon places to be determined beforehand by mutual consent.

XVIII. *Periods for Statistics.*—1. The general statistical account to be taken by virtue of § 12, Art. 10 of the Treaty for the purpose of regulating the payment of the transit rates, shall be prepared, in the first instance, during seven consecutive days on each occasion, from the 1st August, 1875, and from the 1st December in the same year. It shall serve as a basis, for the payments to be made, up to the 30th June, 1876.

2. The subsequent statistical accounts shall be taken for the periods commencing on the 1st June and 1st December respectively.

3. These statistical operations shall be carried out in conformity with the stipulations of Arts. XIX. to XXIII. following.

XIX. *Statistics of Transit in Open Mails.*—1. The Office serving as the medium for the transmission of correspondence in transit *in open mails* received directly from another Office shall prepare beforehand for each separate service a table, according to the form F., in which it shall indicate, distinguishing, if needful, the different routes of transmission, the transit rates to be paid, by weight, to all the intermediate countries, starting from the frontier of exit of the despatching Office up to the frontier of entry of the office of destination. If needful, it shall communicate in due time with the Offices of the countries to be traversed, as to the route which the correspondence shall take, and as to the rates to be paid upon it.

2. After having prepared this table, the said Office shall forward a copy of it to the despatching office interested, in order to serve as the basis of a special account to be established between them with reference to this transit.

3. The despatching office of exchange shall communicate in a table according to the specimen form G., which it shall join to its despatch, the total weight, in two categories, of the correspondence which it shall deliver in transit to the corresponding office of exchange; and the latter, after verification, shall undertake the further transmission of the correspondence to its destination in mixing it with its own, in respect to the payment of the further transit rates.

4. The special account above referred to shall be prepared by the Office which receives the correspondence in transit, and shall be submitted to the examination of the despatching office.

**XX. *Statistics of Transit in Closed Mails.***—1. The correspondence forwarded in closed mails across the territory of one or more other Offices shall form the object of a statement similar to specimen H. The despatching office of exchange shall enter in the letter bill for the receiving office of exchange the net weight of the letters, and of the printed papers, &c., without distinction of the origin of the correspondence. These entries shall be verified by the receiving office, which shall prepare, at the end of the period for taking the statistics, the statement above mentioned, in as many copies as there are Offices interested, including the Office of the place of final despatch.

2. These statements shall be submitted to the verification of the despatching office, and, after having been accepted by it, a copy of the same shall be sent to each of the intermediate Offices.

**XXI. *Transit Accounts.***—The table G. and the statement H. shall be incorporated in a special account, by which shall be determined the annual amount of transit payable to each Office, in multiplying by 26 the combined totals of the two periods. The duty of preparing this account shall fall upon the Office having to receive payment, subject to any other arrangement to be adopted by common consent.

**XXII. *Transit of Post Cards.***—Post cards shall be assimilated to letters in so far as concerns the payment of the transit rates. Those articles must consequently be included in the weight of the letters.

**XXIII. *Exemption from Transit Rates.***—The following articles are exempt from payment of the costs of territorial transit and sea conveyance:—

Redirected and missent correspondence, undelivered correspondence, post office money orders, documents of accounts, and other documents relating to the postal service.

**XXIV. *Weight of Newspapers and Printed Papers.***—As an exceptional measure, it is agreed that the States which, in consequence of their internal regulations, are unable to adopt the decimal metrical system of weight, shall have the right to substitute for it the ounce *avoirdupois* (28.3465 grammes), by assimilating a half-ounce to 15 grammes, and two ounces to 50 grammes, and to raise, if needful, the limit of the single rate of postage of newspapers to four ounces, but under the express condition that, in the latter case, the postage on newspapers be not less than 10 centimes, and that an entire rate of postage be charged for each copy of the newspaper, even though several newspapers be included in the same packet.

**XXV. *Money; Jewelry.***—There shall not be admitted for conveyance by the post, any letter or other packet which may contain either gold or silver money, jewels or precious articles, or any other articles whatever liable to Customs duties.

**XXVI. *Post-cards and Letters not admitted to conveyance.***—Post cards

which are not fully prepaid shall not be forwarded. Each Office shall have, moreover, the right not to forward or not to admit in its service post-cards bearing any description of writing which may be forbidden by the statutory or administrative enactments in force in the country. The same shall be the case for letters and other articles which may bear externally any writing of the character referred to.

XXVII. *International Office*.—1. The Administration of the Posts of the Swiss Confederation is selected to organize the International Office established by Art. 15 of the Treaty. That Office shall commence its functions immediately after the exchange of the ratifications of the Treaty.

2. The ordinary expense of the International Office must not exceed the sum of 75,000 francs annually, exclusive of the special expenses to which the periodical meetings of the Postal Congress may give rise. That sum may be increased ultimately, with the consent of all the contracting Offices.

3. The Administration named in par. 1, above, shall superintend the expenses of the International Office, shall make the necessary advances, and shall prepare the annual account, which shall be communicated to all the other Offices.

4. For the division of the expenses, the contracting countries and those which may be hereafter admitted to join the Postal Union shall be divided into six classes, each contributing in the proportion of a certain number of units, viz.:—

1st class	.	.	.	25 units.
2nd "	.	.	.	20 "
3rd "	.	.	.	15 "
4th "	.	.	.	10 "
5th "	.	.	.	5 "
6th "	.	.	.	3 "

5. These co-efficients shall be multiplied by the number of countries of each class, and the total of the products thus obtained shall furnish the number of units by which the whole expense shall be divided. The quotient will give the amount of the unit of expense.

6. The contracting countries are classified as follows, in view of the division of the expenses:—

- 1st class: Germany, Austro-Hungary, United States of America,  
France, Great Britain, Italy, Russia, Turkey;
- 2nd " Spain;
- 3rd " Belgium, Egypt, Netherlands, Roumania, Sweden;
- 4th " Denmark, Norway, Portugal, Switzerland;
- 5th " Greece, Servia;
- 6th " Luxemburg;

7. The International Office shall serve as the medium for the regular and general notifications which concern international relations. It shall equally receive from each Office published documents relative to its interior service.

8. Each office shall furnish the International Office, in the first half



of each year, with a complete series of statistical details relating to the previous year, in the form of tables prepared according to directions from the International Office, which shall distribute with that view forms properly prepared. It shall incorporate those details in a general statistical report, which shall be distributed to all the Offices.

9. The International Office shall publish, by the aid of the documents which are put at its disposal, a special journal in the German, English, and French languages.

10. The numbers of this journal, as well as all the documents published by the International Office, shall be distributed to the Offices of the Union in the proportion of the number of contributing units mentioned in par. 4. Any additional copies and documents which may be applied for shall be paid for separately at prime cost. Applications of this nature should be made in due time.

11. The International Office shall hold itself always at the disposal of the members of the Union for the purpose of furnishing them with any special information they may require upon questions relating to the International Postal Service.

12. When it shall have submitted to the solution of the several Offices a question which requires the assent of all the members of the Union, those which shall not have sent in their reply within a period of four months shall be considered as giving their consent.

13. The Office of the country in which the next Postal Congress is to be held, shall prepare, with the assistance of the International Office, the business to be submitted to the Congress.

14. The director of the International Office shall be present at the sittings of the Congress and shall take part in the discussions, but without the power of voting.

15. There shall be issued, under his superintendence, an annual report, which shall be communicated to all the members of the Union.

16. The official language of the International Office shall be the French language.

XXVIII. *Language*.—1. The letter bills, accounts, and other forms used by the Post Offices of the Union shall, as a general rule, be drawn up in the French language, unless the offices interested arrange otherwise by direct agreement.

2. As regards official correspondence, the present state of things shall be maintained, unless any other arrangement should subsequently be agreed upon by common consent between the Offices interested.

XXIX. *District of the Union*.—The following shall be considered as belonging to the General Postal Union:—

1. Iceland and the Faroe Islands, as forming part of Denmark.
2. The Balearic Isles, the Canary Islands, the Spanish possessions on the Northern Coast of Africa, and the Postal establishments of Spain upon the Western Coast of Morocco, as forming part of Spain.
3. Algeria, as forming part of France.

4. The Island of Malta, as subordinate to the Post Office of Great Britain.
5. Madeira and the Azores, as forming part of Portugal.
6. The Grand Duchy of Finland, as forming an integral part of the Empire of Russia.

## CHAPTER XXXVII.

## POSTAL MONEY ORDERS.

**ARTICLE 469.** International postal money orders.

470. Money order offices.

471. Language.

472. Charges.

473. Gold basis.

474. Indorsement.

475. Unclaimed money.

476. Settlement of accounts.

*International postal money orders.*

**469.** The post department of each nation shall issue money orders for the transmission between persons in different nations, of sums specified, not exceeding one hundred dollars.<sup>1</sup>

Fifty dollars is the limit set by the conventions for exchange of postal money orders between France and

Prussia, July 3, 1865, Art. I., 9 *De Clercq*, 329.

Switzerland, Mar. 22, 1865, 9 *Id.*, 205.

Belgium, Mar. 1, 1865, 9 *Id.*, 185.

Italy, Apr. 8, 1864, 9 *Id.*, 10.

Postal convention between the United States and

Swiss Confed- } Oct. 12, 1867, Art. I., 16 *U. S. Stat. at L., (Tr.)* 321.  
eration,

Italy, Nov. 8, 1867, " XVII., 16 *Id.*, (Tr.) 229.

Italy, July 8, 1863, " XXII., 16 *Id.*, (Tr.) 225.

<sup>1</sup> The French treaties fix the limit at two hundred francs.

*Money order offices.*

**470.** Postal money orders shall be issued at the office of the post department in the cities of London, Paris, New York, Berlin, St. Petersburg, Vienna, and the other capital cities of the nations parties to this Code;

and in such others as shall from time to time be designated by special compact between the corresponding nations.

The existing treaties generally leave the designation of all the money order offices to special conventions ; but in a general system, it should seem proper for all nations to unite in fixing and promulgating the designation of certain central offices, correspondence with which is to be common to all.

### *Language.*

**471.** The postal money orders shall be in the languages of the corresponding nations.

The French treaties prescribe the French language, providing, however, that the German shall accompany the French text, in the orders issued from the German offices.

### *Charges.*

**472.** There shall be charged on each remittance of funds, under this Chapter, a tax of one per cent., which shall always be paid by the sender.<sup>1</sup>

Postal money orders, and receipts or acquittances therefor, are not subject to any other tax or charge.

<sup>1</sup> A tax of twenty centimes for ten francs, or fraction of ten francs, is provided by the convention for exchange of postal money orders between France and

Switzerland, Mar. 22, 1865, Art. II., 9 *De Clercq*, 205.

Belgium, Mar. 1, 1865, 9 *Id.*, 185.

Italy, Apr. 8, 1864, 9 *Id.*, 10.

The convention between France and Prussia, July 3, 1865, Art. II., (9 *De Clercq*, 329,) is to the same effect, except that as to mandates delivered by a Prussian office, the tax is two silver groschen for every rate of three thalers.

The above treaties provide that the tax shall be divided equally between the two postal departments concerned.

The postal convention between the United States and The Swiss Confederation, Oct. 12, 1867, Art. V., (16 *U. S. Stat. at L.*, (Tr.), 321,) prescribes a complicated rule involving, 1, the domestic money order charge of the despatching office; 2, a charge for international exchange to be fixed by the despatching office, and 3, the domestic charge of the receiving office; the first two to be prepaid, and the third to be paid at the office of destination.

### *Gold basis.*

**473.** If, for the internal convenience of any country, any other currency than gold shall be paid to the beneficiary of the money order, it shall be made as nearly

as practicable the equivalent of gold, according to the relative values existing at the time; and if the sender is allowed to pay for his order in any other currency than gold, the amount certified by the international office is, in all cases, to be the equivalent in gold.

Postal convention between the United States and the Swiss Confederation, Oct. 12, 1867, Art. VII., 16 *U. S. Stat. at L.*, (Tr.), 322.

### *Indorsement.*

**474.** Postal money orders are transferable by indorsement.

Convention for exchange of postal money orders between France and Prussia, July 3, 1865, Art. I., 9 *De Clercq*, 329.

Switzerland, Mar. 22, 1865, 9 *Id.*, 205.

Belgium, Mar. 1, 1865, 9 *Id.*, 185.

Italy, Apr. 8, 1864, 9 *Id.*, 10.

### *Unclaimed money.*

**475.** Sums, unclaimed by those entitled to them, for a period of eight years, become the property of the administration which issued the orders.

Convention for the exchange of postal money orders between France and

Prussia, July 3, 1865, Art. VI., 9 *De Clercq*, 329.

Switzerland, Mar. 22, 1865, " V., 9 *Id.*, 205.

Belgium, Mar. , 1865, " V., 9 *Id.*, 185.

Italy, Apr. 8, 1864, " V., 9 *Id.*, 10.

Compare, however, the postal convention between the United States and the Swiss Confederation, Oct. 12, 1867, Art. VIII., (16 *U. S. Stat. at L.*, (Tr.), 322,) which contains a provision that sums which, after a reasonable delay, cannot for any cause be paid to the beneficiary, shall be re-certified to the despatching administration, for the benefit of the sender, to be repaid in the manner conformable to the interior regulations of the country of origin.

But the administration re-certifying the same shall have the right to first deduct its domestic charge of the same amount as if the remittance had been paid to the beneficiary.

### *Settlement of accounts.*

**476.** The post departments of the corresponding nations shall fix, by special compact with each other, respectively, the times and mode of stating and settling the accounts between them, under this Chapter, and of paying the balances found due from one nation to the other.

## TITLE XVII.

## PATENTS.

The feasibility of an international patent law is questioned in the *Transactions of the British National Association for Promotion of Social Science*, 1862, p. 884; 1861, p. 804.

## ARTICLE 477. Protection of patents.

*Protection of patents.*

477. The same protection which any nation extends to its own members, or to inventions, designs, or discoveries made within its limits, shall be extended upon the same terms and conditions to members of the other nations, and to inventions, designs or discoveries made in any of the other nations, except that, to secure for a work already patented in one nation protection in another, the time for registering it in the latter may be limited to three months.

## TITLE XVIII.

## TRADE-MARKS.

ARTICLE 478. What may be appropriated.<sup>1</sup>

479. Exceptions.

480. Registry of foreign trade-mark.

481. Declaration.

482. Offices where registry is to be made.

483. Equal privileges of foreigners.

*What may be appropriated.*

478. One who produces or deals<sup>1</sup> in a particular thing,<sup>2</sup> may appropriate to the exclusive<sup>3</sup> use of himself, and his successors<sup>4</sup> in interest, as a trade-mark, within any nation party to this Code, any name, form, or symbol which has not been so appropriated by another in such nation,<sup>5</sup> to designate the origin or ownership thereof. But this Title does not authorize the exclusive appropriation of that which is merely either,

1. A name already enjoyed by another person, firm or corporation;<sup>6</sup> or,

2. A common or proper name already in use to designate the thing, or any of its qualities, or its destination; or,

3. An arbitrary sign, not signifying origin or ownership.<sup>7</sup>

<sup>1</sup> A dealer is entitled to protection, though he be not a manufacturer. *Taylor v. Carpenter*, 2 *Sandford's Ch. (New York) Rep.*, 603.

A product of nature, such as the waters of a mineral spring, named and dealt in by the plaintiff, is within the principles of the law of trade-marks. *The Congress and Empire Spring Co. v. High Rock Congress Spring Co.*, New York Court of Appeals, April 1871, 10 *Abbott's Pr. (New York) Rep.*, (N. S.), 349.

The doctrine of trade-marks is founded on the necessity of protection for business interests. The mere assumption of a family name without any connection with trade, is not the subject of a civil action by the

English law. *Du Boulay v. Du Boulay*, 2 *Law Rep., Privy Council*, 430; 17 *Weekly Rep.*, 594; 38 *Law Journal, Privy Council*, 35; 6 *Moore's Privy Council Cases*, (N. S.), 31. Nor can one who does not produce or deal in, an article invoke the law of trade-marks to prevent the producer of, or dealer in, it from using the name of the former. Such a grievance is rather in the nature of defamation. *Clark v. Freeman*, 12 *Jurist*, 149; 17 *Law Journal, Ch.*, 142.

<sup>2</sup> The title of a newspaper is within the principle. *Matsell v. Flanagan*, 2 *Abbott's Pr. (New York Rep.)*, (N. S.), 459; *Stephens v. De Conto*, 4 *Id.*, 47. And the principle may have a local application to a particular business; *e. g.*, to the title of a hotel. *Howard v. Henriques*, 3 *Sandford's (New York Rep.)*, 725; *Deitz v. Lamb*, 6 *Robertson's (New York Rep.)*, 537.

<sup>3</sup> In *Lemoine v. Ganton*, (2 *E. D. Smith*, 343,) it was held that, after a manufacturer had changed his trade-mark, he was still entitled to enjoin the sale by others of goods put up by them under the trade-mark which he had discontinued, thus falsely purporting to be of his manufacture.

<sup>4</sup> The right to use a trade-mark is assignable, even when the mark is a personal one, unless it be so purely personal as to import that the thing is the manufacture of a particular person. *Berry v. Bedford*, 10 *Jur.*, (N. S.), 503; 33 *L. J. Chanc.*, 465; 12 *W. R.*, 727; 10 *L. T.*, (N. S.), 470. In such a case the assignee's use would be deceptive, and therefore would not be protected. *Leather Cloth Co. v. American Leather Co.*, 11 *Jur.*, (N. S.), 513; 35 *L. J. Chanc.*, 53; 13 *W. R.*, 873; 12 *Law Times*, (N. S.), 742; 11 *House of Lords Cas.*, 523. See Article 479.

The right to use the trade-mark passes, by operation of law, by an assignment of the business; thus, a sale of a mineral spring, without expressly including the good-will, or the right to use particular marks, carries to the purchaser the right to use the name of the spring adopted by the former proprietors as a trade-mark. *The Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 10 *Abbott's Pr. (New York Rep.)*, (N. S.), 349.

See, also, *Hudson v. Osborne*, 39 *Law Journal Chanc.*, 79.

<sup>5</sup> The use is protected only in the places where the trade-mark is used by the plaintiff before it is used by others. *Corwin v. Daly*, 7 *Bosworth (New York Rep.)*, 222.

<sup>6</sup> Act of Congress, July 8, 1870, § 79; *Faber v. Faber*, 49 *Barbour*, 357; S. C., 3 *Abb. Pr.*, (N. S.), 115.

And see *Burgess v. Burgess*, 3 *De G. M. & G.*, 896; 17 *Jur.*, 292; 22 *L. J. Chanc.*, 675; *Schweitzer v. Atkins*, 37 *Law Jour. Chanc.*, 847; 16 *Weekly Rep.*, 1080; 19 *Law Times*, (N. S.), 6.

<sup>7</sup> *Collins Co. v. Brown*, 3 *Kay & Johns.*, 428; 3 *Jurist*, (N. S.), 929; *Amoskeag Manufacturing Co. v. Spear*, 2 *Sandf.*, 599; *Petridge v. Wells*, 4 *Abb. Pr.*, 144.

The effect of this qualification will be in accordance with the English and American decisions, that the prior use or appropriation of any name or sign of either of these classes can only be protected in the case of foreign trade-marks, when accompanied by a mark sufficient to distinguish its origin or ownership from the same name or sign when lawfully



used by other persons; and then it is only the combined mark that is protected.

### *Exceptions.*

**479.** Article 478 does not apply to any unlawful business, or to any material which is injurious in itself, or to any trade-mark which has been fraudulently obtained, or which is used with the design of deceiving the public in the purchase or use of any material.

Act of Congress of the United States concerning patents, &c., July 8, 1870, Art. 84, *U. S. Stat. at L.*, vol. 16; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 *Jur.*, (*N. S.*) 513; 35 *L. J., Chanc.*, 53; 13 *W. R.*, 873; 12 *L. T.*, (*N. S.*) 742; 11 *H. L. Cas.*, 523; *Hobbs v. Francis*, 19 *How. Pr.*, 567.

It was held in *Curtis v. Bryan*, (36 *How. Pr.*, 33,) that the principles upon which courts have refused to protect a trade-mark which involved a deception upon the public, do not extend to cases where the deception alleged is not in the trade-mark itself, but in advertisements used to advance the sales of the article; but the provision of the act of Congress of the United States, mentioned above, seems to refuse protection in such a case.

The use of the word "patent," however, on goods not actually patented, but which by long usage are known by that name in the trade, is not such a misrepresentation as deprives the user of protection. *Marshall v. Ross*, 8 *L. R. Eq.*, 651; 17 *W. R.*, 1086; *Stewart v. Smithson*, 1 *Hilton*, 119.

### *Registry of foreign trade-mark.*

**480.** To enjoy the protection afforded by this Title, in any nation other than that in which the claimant is domiciled, the trade-mark must be registered in such nation, with a statement of the following particulars:

1. The name of the party who desires the protection of the trade-mark, and his residence and place of business;

2. The class of merchandise, and the particular description of goods comprised in such class, for which the trade-mark has been or is intended to be appropriated;

3. A description of the trade-mark itself, with a facsimile thereof, and the mode in which it has been or is intended to be applied and used; and,

4. The length of time, if any, during which the trade-mark has been used.

Act of Congress of the United States, July 8, 1870, § 77.

This leaves it to each nation to protect domestic trade-marks to such extent as may be deemed suitable. Thus, in France, certain tradesmen in particular cities enjoy the exclusive use of a mark peculiar to articles of their trade produced in that city.

*Declaration.*

**481.** There must also be filed in the same office with the registry, a declaration, under the oath of the party or his agent, to the effect that the claimant has a right to the use of the same in such nation, and that no other person or corporation has a right to its use there; and that the description and fac-simile presented for registry are true.

*Offices where registry is to be made.*

**482.** The registry of trade-marks under this title, in each nation, is to be made in the office of the chief secretary of state for the interior or home department, and in such other offices as shall from time to time be designated by the legislative authority of the nation.

In the HANSEATIC CITIES, the tribunal of commerce is designated as the place of registry.

Treaty of commerce and navigation between France and the Free Cities of Lubeck, Bremen and Hamburg, March 4, 1865, Art. XXIV., (9 *De Clercq*, 187, 195.)

In the NETHERLANDS, two copies in the registry of the tribunal of the arrondissement at Amsterdam.

Treaty of commerce and navigation between France and the Netherlands, July 7, 1865, Art. XXIV., (9 *De Clercq*, 337, 343.)

In AUSTRIA, two copies in the chamber of commerce of Vienna.

Treaty of commerce between France and Austria, December 11, 1866, Art. XII., (9 *De Clercq*, 646, 649.)

In the Grand Duchy of BADEN, "au bureau bailliage de la ville du Carlsruhe."

Convention between France and the Grand Duchy of Baden, July 2, 1857, Art. II., (7 *De Clercq*, 298.)

In RUSSIA, in the department of manufactures and internal commerce, at St. Petersburg.

Treaty of commerce and navigation between France and Russia, Art. XXII., (7 *De Clercq*, 278, 286.)

In PORTUGAL, at the registry of the tribunal of commerce de première instance.

Convention between France and Portugal, April 12, 1851, Art. XVII., (6 *De Clercq*, 101, 107.)

In FRANCE, in the registry of the tribunal of commerce [of the Seine,] or the council of prud'hommes.

<sup>1</sup> Treaty or convention between France and

Free Cities of Lu-	}	Mar. 4, 1865, Art. XXIV., 9 <i>De Clercq</i> , 187, 195.
beck, Bremen & Hamburg,		

Netherlands,	July 7, 1865, “	XXIV., 9 <i>Id.</i> , 337, 343.
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Austria,	Dec. 11, 1866, “	XII., 9 <i>Id.</i> , 646, 649.
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Grand Duchy of	}	“	II., 7 <i>Id.</i> , 298.
Baden,			

Russia,	June 14, 1857, “	XXII., 7 <i>Id.</i> , 278, 286.
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The convention between France and Portugal, April 12, 1851, Art. XVII., (6 *De Clercq*, 101,) designates the registry of the tribunal of the Seine.

The Act of Congress of the United States concerning “patents,” July 8, 1870, provides for the registration of trade-marks in the Patent Office in Washington, D. C.

### *Equal privileges of foreigners.*

**483.** Every nation party to this Code, which provides for the registration of domestic trade-marks, must allow, upon the same terms and with the same effect, the registration of foreign trade-marks by members, and domiciled residents of the other nations.

## TITLE XIX.

## COPYRIGHTS.

The International Copyright Congress, held at Brussels in 1858, resolved:

1. On the principle of an international recognition of property in works of literature and art, in favor of their authors;
2. This principle ought to be admitted, even in the absence of reciprocity ;
3. Foreign authors should be on the same footing as native;
4. Additional formalities should not be required of foreign authors; it should be enough to comply with the formalities of the law of the place of first publication ;
5. It is desirable that all countries should adopt legislation on an uniform basis.

France (says Blaine, in paper in *Transactions of National Association for Promotion of Social Science*, 1862, p. 868,) has adopted the first four rules, and alone has dispensed with conditions of reciprocity.

Under the French law it is unlawful, without the permission of the author, to publish a work already published in a foreign country with which no copyright convention exists. *Copinger on Copyright*, ch. XVIII., p. 240.

The principal French conventions are with

Austria,	Dec. 11, 1866, 9 <i>De Clercq</i> , 664.
Pontifical States,	July 14, 1867, 9 <i>Id.</i> , 731.
Portugal,	July 11, 1866, 9 <i>Id.</i> , 593.
Grand Duchy of Luxembourg, }	Dec. 16, 1865, 9 <i>Id.</i> , 416.
Hanover,	July 19, 1865, 9 <i>Id.</i> , 366.
Duchy of Nassau,	July 5, 1865, 9 <i>Id.</i> , 332.
Grand Duke of Hesse, }	June 14, 1865, 9 <i>Id.</i> , 310.
Grand Duchy of Mecklenburg- Schwerin, }	June 9, 1865, 9 <i>Id.</i> , 303.
Mecklenburg- Strelitz, }	Sept. 19, 1865, 9 <i>Id.</i> , 372.
Saxony,	May 26, 1865, 9 <i>Id.</i> , 286.
Baden,	May 12, 1865, 9 <i>Id.</i> , 244.
Frankfort,	Apr. 18, 1865, 9 <i>Id.</i> , 232.
Bavaria,	Mar. 24, 1865, 9 <i>Id.</i> , 222.
Belgium,	May 1, 1861, 8 <i>Id.</i> , 264.
Prussia,	Aug. 2, 1862, 8 <i>Id.</i> , 495.

—(extended to) Electorate of Hesse, 9 *Id.*, 205 ; Principalities of Reuss, 9 *Id.*, 221, 283 ; of Schwartzburg-Rudolstadt, and of Schwartzburg-Sondershausen, 282 ; of Waldeck and Pyrmont, 284 ; of Lippe and of Anhalt, 373 ; of Lippe Detmold, 470 ; of Schaumbourg Lippe, 471 ; to the Duchies of Saxe Altenbourg, 228 ; of Brunswick, 232 ; of Saxe Coburg Gotha, 285 ; of Anhalt Dessau, 472 ; and to Hesse Hornbourg, 284.

England has international copyright conventions (less complete and liberal than those of France,) with Prussia, France, Italy, Belgium, Spain and some other Powers.

ARTICLE 484. Ownership of products of the mind.

485. Transfer.

486. Subsequent inventor, author, &c.

487. Private writings.

488. Correspondence addressed to public offices.

489. Right of protection.

490. Extent of protection.

491. Translations.

492. Extracts from newspapers and periodicals.

493. Power to prohibit works.

494. Saving clause as to existing works.

*Ownership of products of the mind.*

484. The author of any product of the mind, whether it be an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof ; and the sole right to copy the same or reproduce it in any form, or to modify or adapt it or any part of it to new circumstances, subject to the provisions of this Title.

*The Civil Code, reported for New York, § 429.*

This provision establishes an international recognition of property in works of literature and art, in favor of their authors, and without reference to reciprocity (except to the extent to which all provisions of this Code are reciprocal,) which are the first two principles agreed upon by the International Copyright Congress of Brussels, of 1858.

*The Civil Code, reported for New York, (§ 430,)* also provides for joint ownership.

It has been held in the New York Superior Court, that the common law right of the author of a dramatic composition is not affected by the ordinary public representations, and that a spectator's reproducing the composition from memory was an infringement. *Palmer v. De Witt*, 40 *Howard's Pr. (New York) Rep.*, 293.

*Transfer.*

**485.** The author of any product of the mind, or of any representation or expression thereof, may transfer his property in the same, or any part thereof, and thereupon the property transferred becomes subject to further transfer like other property.

*The Civil Code, reported for New York, § 431.*

*Subsequent inventor, author, &c.*

**486.** If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior author, which is exclusive to the same extent against all persons except the prior author, or those claiming under him.

*The Civil Code, reported for New York, § 433.*

*Private writings.*

**487.** Subject to the next article, letters and other private<sup>1</sup> communications belong to the person to whom they are addressed and delivered;<sup>2</sup> but they cannot be published against the will of the writer,<sup>3</sup> except by authority of law.

*The Civil Code, reported for New York, § 434.*

See *Woolsey v. Judd*, 4 *Duer's (New York) Rep.*, 389, and cases there cited; *Eyre v. Higbee*, 35 *Barbour's (New York) Rep.*, 502.

Compare *Copinger on Copyright*, ch. II., p. 24, and authorities cited in note (d.).

<sup>1</sup> Communications received from correspondents by editors or proprietors, (if sent expressly or impliedly for the purpose of publication,) become the property of the person to whom they are directed, and cannot be published by any other person obtaining possession of them; nor by such editor or proprietor, if, previous to publication, the writer expresses a desire to withdraw them. *Copinger on Copyright*, ch. II., p. 32.

<sup>2</sup> The difficulty in defining the rule upon this subject arises from the fact that two rights are involved: First, the ownership of the document, with the incidental advantages attaching to the personal control of it as a repository of the information communicated,—such, for instance, as the right to use it as evidence, or to destroy it, (see *Eyre v. Higbee*, 35 *Barbour's (New York) Rep.*, 502, 513,)—which ownership is protected by the same rules that apply to other chattels; Secondly, the right of property in the product of mind embodied in the document, and which remains in the author when the communication is private, that is to say, not intended for publication—a right which extends to the control, not of the document as a thing, but to controlling the reproduction of the form in which

thought is embodied in it—a right which becomes important in proportion to the value of the mental product.

<sup>3</sup> It may be a question whether the affirmative consent of the writer, or his personal representatives or assigns, should not, in strictness, be made the condition.

*Correspondence addressed to public offices:*

**488.** The government of a nation has the right to publish or withhold all letters addressed to its public offices.

*Curtis on Copyright, 98.*

*Right of protection.*

**489.** Any nation may prescribe the formalities requisite to the enjoyment of copyright within its jurisdiction, and may limit the copyright to any period not less than twenty-five years, but for such period the rights of an author, as defined by article 484, must be protected by the laws of every nation, and the formalities prescribed must not be oppressive.

*Extent of protection.*

**490.** The same protection, even beyond that secured by the last article, which the copyright laws of any nation extend to its own members, or to works produced or first published within its limits, must be extended, upon the same terms, to the members of the other nations, and to works produced or first published therein; except that, to secure for a work first published in one nation protection in another, the time for registering it in the latter may be limited to twelve months, and a deposit of a foreign copy may be required.

The European copyright treaties,—of which there are a number, uniting France with Great Britain, Austria, the German States, Portugal, Belgium, Switzerland, Russia, the Pontifical States, the Netherlands, and other countries,—are generally framed by enumerating the classes of works protected, and by prescribing the method of registration for copyrighting a foreign work.

The following summary of the treaty between Great Britain and France, Nov. 3, 1851, gives an indication of the provisions common in these treaties :

The authors of works of literature and art published in England shall have the same protection in France as French authors have there, and *vice versa*.

Works of literature and art are understood to comprehend books, dramatic works, musical compositions, drawings, paintings, sculptures, engravings, lithographs, and any other production whatsoever of literature or the fine arts.

The protection granted to original works is extended to translations; it being, however, clearly understood that protection is afforded simply to a translator in respect of his own translation, and not to confer the exclusive right of translating upon the first translator of any work.

If the author of any work published in either country wishes to reserve to himself the exclusive right of translating his work in the other country, he may do so for five years from the first publication of the translation authorized by him, on complying with the following conditions :

1. The original work must be registered and deposited in the one country within three months after the publication in the other.

2. The author must notify, on the title-page of his work, his intention to reserve the right of translation.

3. At least a part of the authorized translation must appear within a year after the registration and deposit of the original, and the whole must be published within three years after the date of such deposit.

4. The authorized translation must appear in one of the two countries, and be registered and deposited in the same way and within the same time as an original book.

With reference to works published in parts : each part is to be treated as a separate work, and registered and deposited in the one country within the three months after its first publication in the other, and a declaration by the author to the effect that he reserves the right of translation in the first part, will be sufficient.

Dramatic works and musical compositions are protected in France to the same extent as in England. The translation of a dramatic work, however, must appear within three months after the registration and deposit of the original.

This protection is not intended to prohibit fair imitations or adaptations of dramatic works to the stage in England and France respectively, but is only designed to prevent piratical translations. And the question, what is an imitation or a piracy, is in all cases to be decided by the courts of justice of the respective countries, according to the laws in force in each.

Extracts from newspapers and periodicals may be freely taken from either country, and republished or translated in the other, if the source whence they are taken be acknowledged, unless the authors of the articles shall have notified in a conspicuous manner, in the journal or periodical in which such articles have appeared, that they prohibited the republication or translation thereof.

This stipulation, however, does not apply to articles of political discussion.

Importation of pirated copies is prohibited, and in the event of an infraction of this prohibition, the pirated works may be seized and destroyed.

In order to obtain protection in either country, the work must be registered in the following manner :



If the work first appear in France, it must be registered at Stationers' Hall, London; if it appear first in England, at the Bureau de la Librarie of the Ministry of the Interior at Paris, within three months after the first publication in England. As to works published in parts, they must be registered within three months after the publication of the last part; but in order to preserve the right of translation, each part must be registered within three months after its publication. A copy of the work must also be deposited within the same time as the registration to be made, either at the British Museum in London, or in the National Library in Paris, as the case may be.

The certified copy of the entry in either case is evidence of the exclusive right of publication in both countries until the contrary is proved.

With regard to articles other than books, maps, prints, and musical compositions, in which protection may be claimed, any other mode of registration, which may be applicable by law in one of the two countries to any work or article first published in such country, for the purpose of affording protection to copyright in such article, is extended on equal terms to any similar article first published in the other country.

See, also, convention between Great Britain and

Prussia, June 4, 1855, { *Accounts and Papers*, 1856, vol. LXI., (24.)  
(Additional to convention of May 13, 1846.)

Belgium, Aug. 12, 1854, *Id.*, 1854-5, vol. LV., (26.)

Article 490 above, however, seems to present an equally efficacious and more simple rule; and the right of aliens to avail themselves like citizens of the copyright laws being thus conceded, all the proper legal remedies are assured, as in other cases, by the provisions of Part VI., respecting THE ADMINISTRATION OF JUSTICE.

No distinction is made in France, between foreigners and French subjects, as to copyright, provided they make the necessary deposit. All kinds of unpublished works, lectures, &c., are the exclusive property of their authors. *Levi's Commercial Law*, vol. II., p. 581; *Copinger on Copyright*, ch. XVIII., p. 239.

Mr. Blaine suggests that an uniform system of registration and international exchange of records be adopted, so that registry, according to the law of the State of first publication, will be followed by transmission of the record to the other nations, and consequent protection there. *Transactions of National Association for Promotion of Social Science*, 1862, p. 869.

The drafted treaty between Great Britain and the United States, 1853, contained a provision that when a foreign work is copyrighted the edition must be as cheap as the cheapest foreign edition.

### *Translations.*

**491.** Copyright includes the right of translation into other languages; but, in order to preserve such right, the intention to do so must be announced upon the title-page of each volume, and of each part, if published in parts, and the publication of a translation must be

commenced within one year from the publication of the original.

Unless the right of translation is secured under this article, any translator may have a copyright of his translation.

See the convention between France and Austria, Dec. 11, 1866, Art. IV., (9 *De Clercq*, 664,) and those with the German States, 1865, 9 *Id.*

And see note to Article 490, concerning translations of dramatic works.

The French conventions with Portugal and several of the German States contain a provision that the author of a dramatic work, who would reserve the exclusive right of translation and of representation, must publish his translation, or produce the piece on the stage within three months after the formalities of copyright.

*Extracts from newspapers and periodicals.*

**492.** Extracts from newspapers and periodicals published in one nation may be freely republished or translated in another, if the source whence they are taken be acknowledged; except that the author or publisher of an article not involving political discussion may reserve strict protection by a conspicuous notice published with the article.

See note to Article 490, and the conventions there referred to.

To the same effect are the conventions between France and Austria, Portugal, German States, Pontifical States, and Russia.

*Power to prohibit works.*

**493.** The provisions of this Title are subject to the power of any nation to control or prohibit the importation, sale, circulation or publication, within its territorial limits, of any work or production.

This qualification is usual in the treaties, to reserve the ordinary measures of police, and also any obligations arising out of agreements with other nations by which particular works may have been prohibited.

*Saving clause as to existing works.*

**494.** The provisions of this Title do not prevent the continuation of the publication or sale in any nation of works already in part or wholly published therein.

The convention between France and Portugal qualifies this provision by adding that no further publication can be made other than necessary to complete orders or subscriptions already commenced. In the treaty between France and Russia, the saving clause extends to works to be published within one year.

## TITLE XX.

## MONEY.

ARTICLE 495. Adjustment of accounts between nations, and between members of different nations.

496. The money of account to follow the law of decimal subdivision.

497. Gold to be the standard.

498. The standard of fineness prescribed.

499. Definition of the money unit.

500. What gold coins shall be legal tender.

501. Silver coinage.

502. What silver coins shall be legal tender.

503. Limits of variation from standard weight or fineness within which coins shall be current.

504. Standard weights.

505. Scrutiny of the coinage.

506. Coins may be called in by proclamation.

507. Uncurrent coins may be destroyed.

508. Coins of base metal not to form a part of the international currency.

*Adjustment of accounts between nations, and between members of different nations.*

495. All accounts and transactions between the nations, and between the members of different nations, involving money, shall be rendered and settled in terms of the unit of money established by this Code, and of its subdivisions.

The first of the propositions agreed upon by the international monetary convention held in Paris, in 1867, declared that "an identical unity" ought to be established between the gold coins of all nations. Identity in the common money unit does not necessarily require uniformity of coinage, though the coins should stand in such simple relations to the unit that all the larger national coins may have an international circulation. In this manner the system of coinage which is found to be practically the most convenient will ultimately prevail, and secure universal acceptance.

*The money of account to follow the law of decimal subdivision.*

496. The denominations of money higher and lower

than the unit, shall be decimal multiples and sub-multiples of the unit.

The conclusive argument in favor of the decimal system of money weights and measures is, that this is the system of our arithmetical numeration, and that by its adoption abstract and concrete values are reduced to a common form of expression. If it were practicable, in abstract arithmetic, to introduce a different law of increase, a more convenient ratio might possibly be found than the decimal, but no advantage which could be secured by the adoption of such a ratio in the affairs of life, can be a compensation for the great disadvantage which accompanies any departure from the law of numbers. This consideration determined the adoption of the decimal division in the metrical system of money, weights and measures, and in the American system of money.

Coins may be struck, according to convenience, of multiples, and sub-multiples, of the unit, not decimal.

*Gold, to be the standard.*

#### 497. The monetary standard shall be gold only.

The principle of a double standard is illogical. It assumes that law can make a relation permanent which nature has made variable. In defense of the double standard it has been argued by some authorities, and notably by Mr. *Wolowski*, at the international conference of 1867, that such a standard tends to maintain greater stability in the measure of value, by preventing a serious disturbance of prices on occasion of an abnormal scarcity of one or the other of the precious metals. Practically, however, where a double standard has existed, the effect has been to induce a debasement of the coinage in that metal of which the market value exceeds the legal. Accordingly, though at the time of the international conference of 1867 a double standard actually existed in a number of the States represented, the conference was unanimous in favor of a single standard; and though in all but two of these twenty States the existing standard was either silver, or both silver and gold, the conference pronounced with equal unanimity for gold only. This metal is recommended by its superiority of value over silver of equal bulk or weight; and its consequently greater portability, and by the fact that it is practically already, in Europe and America, the medium of all large monetary transactions.

*The standard of fineness prescribed.*

#### 498. The standard quality, or degree of fineness, of the metal employed in coinage, shall be nine parts of pure gold to one part of alloy.

The existing diversity among the coins of different nations, as it respects alloy, is very great. For gold coins, the standard fineness above proposed has been adopted by France, Belgium, Switzerland, Italy, the United States, Prussia, Bavaria and Spain; also by Austria, for her crown and half-crown, and by Holland, for her double William, and its submultiples. For her ducat and double ducat, Holland employs an alloy con-

taining fifty-nine parts of pure gold out of sixty of total weight. Austria, for the coin of the same name, prescribes a fineness of seventy-one parts out of seventy-two, which is the quality of metal used also by Würtemberg for her gold coins.

Great Britain, Portugal, Brazil and Turkey employ a standard consisting of eleven parts of pure gold out of twelve in total weight; and Sweden, one of thirty-nine parts out of forty. Elsewhere, the standard falls below nine-tenths; being lowest in Egypt, where it consists of seven parts of pure gold out of eight of total weight. *Official Report on the International Exposition of Coins, Weights and Measures of 1867.*

The fineness of silver coins is equally various. For their larger coins, France, Belgium, Switzerland, Italy, Prussia, Bavaria, Würtemberg, Baden, Hesse, Austria, Spain and the United States adhere to the standard of nine-tenths. England employs thirty-seven fortieths, and Holland 945-1000. Elsewhere, generally, a lower standard, of varying fineness, prevails; and as a rule, in all countries the subsidiary silver coinage is debased below nine-tenths. *Report above cited.*

Some of these irregularities will necessarily disappear, in the natural course of events. A single monetary system will no doubt soon replace the diversities which are at present found in the German States; and the standard of Prussia and Bavaria will prevail throughout the empire. By far the larger part of the coinage of the world (that of Great Britain being for the moment put out of the question) is therefore now, or will shortly be, conformed to the standard fineness of nine-tenths, as it respects both gold and silver. The delegates of Great Britain, at the international conference of 1867, assented to the expediency of conforming the British coinage in future to the same standard. *Report of the British Delegates to the International Monetary Conference.*

It is in favor of this compound, that it is superior to most others, and to the pure metal, in point of hardness, and is therefore conducive to the durability of the coinage.

Since the value of coin is estimated according to the weight of fine metal which it contains, the base metal forming the alloy being accounted as worth nothing, it would be quite possible to have coins identical in value while differing both in appearance and in weight. Such coins would lack the qualities essential to secure to them an international circulation; and beyond the limits of the States by which they were issued, they would be regarded as foreign, and would be received with hesitancy.

Their variety would also increase the difficulty of distinguishing the genuine from the spurious. Moreover, in making payments it would be impossible to transfer coin from hand to hand by weight, in case the coins of different countries were mixed; a circumstance which in itself would be found to be a great disadvantage.

In order, therefore, that there may be created a coinage truly international, it is indispensable that there should be universally adopted an uniform standard of fineness in the metal employed.

In these considerations there is likely to be found an obstacle to the probably successful working of a plan proposed in 1870 by the govern-

ment of the United States to the governments of Europe, through a circular dispatch of the Secretary of State to the ministers of the United States resident abroad, the object of which was to avoid the difficulties attendant on the immediate creation of an international coinage for universal and exclusive use, by effecting, what is called in the dispatch, an *assimilation* of the several national coinages. In order to this, the plan proposed that the existing gold coins of all nations should be retained under the same denominations as at present; but that they should be slightly modified in weight, so that the weights of fine gold contained in them should be exact multiples of a certain assumed unit weight. The unit weight suggested was one decigramme of fine gold. This plan would make the values of the gold coins of the several nations commensurable with each other; but the ratios of commensurability which it would introduce would lack the desired simplicity; and the diversity of the alloys in use would prevent any national coinage from securing an extensive international circulation.

*Definition of the money unit.*

**499.** The unit to be taken as the basis of the international monetary system, shall be called a dollar; and shall be of the value of one and a half grammes of fine gold, or five tergrammes<sup>1</sup> of standard gold.

<sup>1</sup> The word tergramme, formed on the principles of the metric nomenclature, signifies one-third of a gramme.

In the determination of a unit to serve as the basis of the system, the choice lies between three possibilities:

1. To take for the purpose some value totally different from that of any existing coin or denomination of money, by the adoption of which all monetary systems at present existing will be superseded.

2. To take some coin or denomination of money actually existing; that is, to take some type which is at present simply national, and to make it universal.

3. To take some value which, in itself, or in its multiples or submultiples, shall so nearly approach the principal coins of the nations embracing the largest population, and most largely engaged in conducting the world's exchanges, that these, by means of inconsiderable changes, may be accommodated to it.

On purely theoretical grounds, the first of the expedients here presented is preferable to either of the others. Coins must be adjusted by weight; and in the absence of any actual system of coinage, it would be advisable to make the unit of money identical with the unit of weight, or with some simple subdivision of that unit.

Supposing the metric system of weights to be legalized, the absolute weight of any mass of standard metal, coined or uncoined, would thus have the same numerical expression as the absolute money value; or these expressions would differ only in the place of the decimal point.

In the actual state of things, however, it is to be borne in mind that the habits of thinking of all peoples, in regard to objects of value, have been

formed upon their existing monetary systems, and that the prices of all commodities have been adjusted in accordance with the denominations of money in daily use. While, therefore, it is desirable that the unit of money should be related to the unit of weight in as simple a ratio as practicable, it must be considered that any scheme which shall break up all these familiar associations, will be unacceptable to practical men ; so that, whatever may be its merits in a point of view purely scientific, it will probably fail of success. It is also to be borne in mind that the amount of gold and silver coin now in existence cannot be less than \$2,500,000,000 ; \* and that if a plan of monetary unification can be de-

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\* The total amount of coin existing can only be matter of estimate. The amount assumed above is the estimate of Mr. *McCulloch*, in his article on the "*Precious Metals*," in the *Encyclopædia Britannica*. Mr. *McCulloch* names, in a note appended to the article cited, the numerous authorities upon which he has founded his conclusion. He gives to Great Britain £70,000,000 or £75,000,000, as representing the gold and silver currency, and the reserves in the banks. Professor *Jevons*, in a recent communication (1868) to the Statistical Society of London, puts the gold coin in sovereigns and half-sovereigns, at £80,000,000 ; and Mr. *Miller*, of the Bank of England, cited by Dr. *Farr*, in his report to the international Statistical Congress at the Hague, (1869,) maintains that it cannot be less. As Professor *Jevons* puts the silver coinage of Great Britain at £14,000,000, his estimate for the total amount of gold and silver coin existing in Great Britain is £94,000,000, exceeding that of Mr. *McCulloch* very materially.

Mr. *McCulloch* gives to France £130,000,090, or £140,000,000 ; making for the two countries, Great Britain and France, £200,000,000 ; or £215,000,000 ; say \$1,050,000,000. For the rest of Europe, for North and South America, for Australia, for the Cape of Good Hope, and for Algeria united, he supposes the amount may be in the neighborhood of £300,000,000 ; so that, for all the world, excluding Asia and the African States, except Algeria, the total is probably between £490,000,000 and £510,000,000 ; that is to say, £500,000,000, or \$2,500,000,000.

Mr. *S. B. Ruggles*, of New York, delegate of the United States to the international monetary conference at Paris in 1867, in a written argument addressed to that body in favor of the coinage of a gold piece of the value of twenty-five francs, stated the total amount of the United States gold coinage up to 1866, at \$845,500,000, of which he assumed that \$300,000,000 still exists in the country. He gave the total of gold coin existing in France, Belgium and Italy, according to the estimates of M. *de Parieu* and other distinguished publicists, at \$1,400,000,000 ; and he assumed that in all Europe the total would not be less than \$1,800,000,000. This estimate seems moderate, when we consider that Mr. *McCulloch* cites as probable an estimate for Russia only, of about \$270,000,000 ; and consider further, that there remain Spain, Portugal, Holland, Denmark, Sweden, Norway, Switzerland, Austria and Germany still to be accounted for.

Taking, however, the estimates of Mr. *Ruggles* for continental Europe, at \$1,800,000,000, and for the United States, at \$300,000,000, along with those of Messrs. *Jevons* and *Miller*, for Great Britain, of say \$500,000,000, we have already a total of \$2,600,000,000 ; without considering Mexico, the British Possessions in North America, the West India Islands, Central America, South America, Australia, the Cape, and Algeria, for which it would be a low estimate to suppose that they have among them \$400,000,000. The amount, therefore, assumed above as the total of the gold and silver coinage of European nations, and of nations and colonies of European origin, still actually existing, is probably considerably below, rather than above, the real amount.

vised under which a large portion of this great sum may still be employed to subserve the purposes of money without recoinage, this consideration will weigh heavily in its favor.

It happens that the relations of the representative coins of France, the United States and Great Britain, form nearly a geometrical series. This fact has led to a number of suggestions, all contemplating the possibility of bringing these coins, and through them the monetary systems of the three countries, into complete harmony, without entailing any serious inconvenience upon the peoples concerned. Such a result might be reached by adopting the second or the third of the possible modes of unification pointed out above ; that is to say, by taking the franc, the pound sterling, or the dollar, at the actual value of the coin chosen, as the money unit ; or, on the other hand, by assuming a value having metric relations, unlike any one of these coins, but capable, by slight changes in their several values, of being brought into harmony with all of them.

It is an objection to the adoption of the franc, the sovereign, or the dollar, at the precise values which now belong to these coins by law, that the weight of no one of them is expressible in an exact number of grains or of grammes, or even in a number of grains or of grammes embracing only simple fractions. Notwithstanding this very serious objection, the international conference at Paris did not hesitate to recommend, with a near approach to unanimity, that the French gold piece of five francs, of the metric weight of gr. 1.612903, should be made the basis of an international system of money. To this weight it was proposed to reduce the American dollar, from its present metric weight of gr. 1.671813 ; a reduction which would diminish its value a little more than three and a half per cent. ; and to accord with this, it was likewise proposed to coin the British sovereign of the metric weight of gr. 8.064515 with a fineness of nine-tenths, instead of gr. 7.98805, as at present, of the fineness of eleven-twelfths, (the British standard,) which is equivalent to a weight of gr. 8.13598, of the fineness of nine-tenths ; by which change its value would be reduced 88-100 of one per cent.

The argument which seems to have decided the conference in favor of this proposition, was the fact that the French system of coinage is now the system also of Belgium, Switzerland and Italy as well, by virtue of a monetary treaty concluded December 23, 1865, which is to remain in force until January 1, 1880, and longer, if not sooner repealed. A system which has already secured acceptance with half Europe, (excluding Russia and the Scandinavian States,) and which is represented by an actual coinage of no less value than \$1,400,000,000, or \$1,500,000,000, was presumed to be too strongly rooted to be superseded even by a better one ; and impressed with this conviction, the conference believed that Great Britain and the United States would be constrained to adopt the same system, and thus determine its ultimate adoption by all nations.

A request was therefore presented to the government of France, to invite all the governments which were represented in the conference, to signify, on or before the 15th day of February, 1868, their willingness to



adhere to the basis proposed, or the contrary. Up to the present time it is not known that any notices of adhesion have been sent in.\*

In Great Britain, a royal commission reported upon the proposition, in July, 1868, unfavorably; and the efforts which have been repeatedly made to secure a more favorable result in the American Congress have thus far failed. There is no prospect, therefore, that the plan proposed by the conference can soon command acquiescence from any nations beyond those which have already committed themselves to its temporary use.

Its adoption, had it succeeded, would have established a permanent discordance between the system of coinage and the metric system of weights and measures; and on that account its failure is by no means to be regretted. The fact, moreover, seems to be, that the entire body of the coinage of gold and silver which has been issued from the French mints on this basis is below the legal standard in regard both to fineness and to weight.† (*Director U. S. Mint Rep. for 1867. Baron Eugene Nothomb in Prussian Annals.*) So that, in its present condition, it could never be received as part of an international coinage. The argument, therefore, drawn from its large amount, falls to the ground.

Neither the pound sterling, nor the dollar, nor any other existing coin, except the piece of five-francs, has been proposed unconditionally as the basis of an international coinage. The delegates from Great Britain to the international conference suggested the idea of a ten-franc piece having the value of eight shillings sterling, to serve as a monetary unit, on the ground that this would be more likely to secure acceptance in England than the unit of half that value proposed by the conference; but this suggestion received no support.

All the remaining propositions as yet made with regard to the monetary unit recognize the necessity of deviating, at least to some degree, from the actual weight and value of any existing coin; but they all aim at the same time to avoid so large a deviation as to render the entire coinage of the world, or even a great part of it, unavailable for the uses of money. The most noteworthy of these propositions may be enumerated as follows:

1. To make the dollar the unit, giving it the weight of 1.62 grammes of standard gold, nine-tenths fine.‡
2. To make the dollar the unit, giving it the weight of 1.2-3ds grammes of standard gold, nine-tenths fine.§

\* This remark is to be understood of the plan of the Paris conference *in full*. The adoption of a single standard, and of gold only as the standard, constituted an essential part of this plan; and to this France herself has not yet acceded. A disposition to accept the five franc gold unit has, however, been manifested by Spain, Sweden, Austria, Roumania, and Greece; as well as by the nations parties to the monetary treaty of December 23, 1865, to whom, of course, this part of the plan is acceptable.

† It is but just to add that these imputations upon the character of the gold coinage of France are said to have been more recently denied by the officers in charge of the French mint in Paris.

‡ Proposition of Mr. *George F. Dunning*, Sup't U. S. Assay Office, New York City. Letter to Mr. *Dubois*, U. S. Mint at Phila. Feb. 8, 1868.

§ Plan of Mr. *E. B. Elliott*, Am. Assoc'n Adv. Sci., August, 1868.

3. To take as a unit the value of one gramme of standard gold, nine-tenths fine, to be called a sol, or soldo.\*

4. To take as a common measure of value one decigramme of pure gold.†

To consider these propositions in their order :

In favor of the first, it is urged that it would only require, in the British gold coins, a change of 44-100ths of one per cent., and in the French gold coins, an opposite change of precisely the same small amount, to reconcile them with the Federal coinage ; but the Federal coinage, on the other hand, would require to be reduced 3.1-10th per cent. It is unfortunate also, that the change required by this plan, in French gold, is in the direction of increase of weight while the whole mass of the French coin existing is below standard weight already. The proposer of this plan considers it a recommendation that it provides a coinage in which the weights are expressed by round numbers of grains ; the unit weight 1.62-100ths grammes, being the equivalent, within an infinitesimal fraction, of 25 grains. This relation is, however, unimportant, since it is to be desired that grain-weights shall cease to be used as soon as possible.

The second proposition is that which has been adopted in the foregoing Article. Its advantages are, first, that it furnishes a unit bearing a simple relation to the system of metric weights, but which is yet so nearly identical with the dollar of the United States (about 3-10ths of one per cent. less) as to require no account to be taken of the difference.

It presents, secondly, points of near approach to the monetary systems of the nations in every part of the world, whose populations are most numerous, and whose commerce contributes most largely to the increase of the world's wealth. As a unit of account, it is furthermore likely to prove more generally acceptable than the much larger unit presented in the pound sterling, or the much smaller one represented by the franc.

And, finally, it is a consequence of the long-continued and extensive use in past time of the Spanish dollar, with which this unit is nearly identical, and of the fact that the dollar is to-day the unit actually employed in the commercial dealings of nearly four hundred millions of people, (*Dispatch of Secretary Fish, cit. supr.*), that the adoption of this coin as the basis of the international monetary system will introduce no novelty, and will, therefore, require but little effort to make the system universally intelligible.

The following table has been calculated from data found in the "Catalogue Officiel" of the Exposition of Weights, Measures, and Monies, Paris, 1867, and in the Report of the Secretary of the Treasury of the United States for 1867 ; together with information furnished by *E. B. Elliott, Esq.*, Statistician, U. S. Treasury Department.

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\* Mr. *Michel Chevalier*, in the *Journal des Economistes*, Nov., 1868, proposes a gramme of gold of nine-tenths fine as the unit, or a decimal multiple of the gramme. Dr. *William Farr*, delegate from Great Britain to the Statistical Congress at the Hague, in 1869, in a report made to that Congress, approves this idea, but strongly advocates the decigramme of nine-tenths fine as the unit, which he would call the *Victoria*.

† Proposition of Secretary *Fish*, in Circular Dispatch to U. S. Ministers abroad, in 1870.

*Relations of the Metric Dollar to the principal Gold Coins of Europe, America, North Africa and Japan.*

Country.	Coin.	Fineness.	Present weight in grammes.	Weight reduced to 9-10 Fineness.	Proposed Weight.	Amount of change proposed.	Per cent. of change proposed.	Value of coin ref'd to international unit.
United States	Double Eagle....	$\frac{900}{1000}$	33.436	33.436	33.333	-0.103	-0.31	20.00
"	Eagle.....	"	16.718	16.718	16.666	-0.052	-0.31	10.00
"	Half Eagle.....	"	8.359	8.359	8.333	-0.026	-0.31	5.00
"	Dollar.. ..	"	1.672	1.672	1.666	-0.005	-0.31	1.00
Great Britain	Sovereign.....	$\frac{916.7}{1000}$	7.988	8.136	8.353	+0.197	+2.43	5.00
"	Half Sovereign...	"	3.994	4.068	4.166	+0.098	+2.43	2.50
France,.....	Napoleon.....	$\frac{900}{1000}$	6.452	6.452	6.666	+0.215	+3.33	4.00
"	Piece of 10 Francs	"	3.226	3.226	3.333	+0.107	+3.33	2.00
Muntzverein.	Triple Crown....	"	33.333	33.333	33.333	0.000	0.00	20.00
"	Crown.. ..	"	11.111	11.111	11.111	0.000	0.00	6.67
Spain.....	Doubloon... ..	"	8.387	8.387	8.333	-0.054	-0.64	5.00
"	Piece of 4 Escudos	"	3.355	3.355	3.333	-0.022	-0.65	2.00
"	Piece of 2 Escudos	"	1.677	1.677	1.666	-0.011	-0.65	1.00
Holland.....	Ten Gulden.....	"	6.729	6.729	6.666	-0.063	-0.94	4.00
"	Ducat.....	$\frac{983}{1000}$	3.494	3.817	3.750	-0.067	-1.78	2.25
"	Ryder.....	"	.....	.....	10.000	.....	.....	6.00
"	Half Ryder.....	"	.....	.....	5.000	.....	.....	3.00
Portugal.....	Coroa.....	$\frac{916}{1000}$	17.783	18.099	18.333	+0.234	-1.29	11.00
Austria.....	Ducat.....	$\frac{986}{1000}$	3.483	3.817	3.750	-0.067	-1.78	2.25
Denmark....	Piece 10 Thaler..	$\frac{895}{1000}$	13.281	13.207	13.330	+0.126	+0.95	8.00
Sweden.....	Ducat.....	$\frac{975}{1000}$	3.452	3.740	3.750	+0.010	+0.27	2.25
Russia.....	Polou Imperial..	$\frac{880}{1000}$	6.532	6.887	6.333	-0.054	-0.85	3.80
Mexico.....	Doublon (new)...	$\frac{866}{1000}$	26.982	25.963	25.833	-0.130	-0.50	15.50
"	Piece 20 Pesos...	$\frac{875}{1000}$	33.778	32.840	33.333	+0.490	+1.49	20.00
Bolivia.....	Doublon.....	$\frac{870}{1000}$	26.967	26.068	25.833	-0.235	-0.90	15.50
Ecuador.....	Piece 4 Escudos..	$\frac{844}{1000}$	13.468	12.630	12.500	-0.130	-1.03	7.50
Brazil.....	Piece 10 Milreis..	$\frac{916}{1000}$	8.963	9.122	9.166	+0.044	+0.48	5.50
Peru.....	Piece 20 Soles....	$\frac{898}{1000}$	32.192	32.120	33.333	+1.213	+3.77	20.00
Chili, .....	Piece 10 Pesos...	$\frac{900}{1000}$	15.303	15.303	15.000	-0.303	-1.98	9.00
Turkey.....	Piece 100 Piastres	$\frac{915}{1000}$	7.185	7.805	7.500	+0.195	+2.67	4.50
Egypt.....	Egyptian Guinea	$\frac{875}{1000}$	8.539	8.302	8.333	+0.031	+0.37	5.00
Tunis.....	Piece 25 Piastres.	$\frac{900}{1000}$	5.008	5.008	5.000	-0.008	-0.16	3.00
Japan.....	Cobang (new)....	$\frac{572}{1000}$	8.939	5.713	5.833	+0.120	+2.10	3.50

The third scheme possesses in many respects the advantages of the one just considered, and is also recommended as being in the strictest sense metrical, since it presents the simplest possible relation to the metric system of weights. According to this, the weight of a mass of coin in grammes has numerically the same expression as its value in soldos. The following schedule shows its relations to various national coins in actual use.

Country.	Coin.	Present weight in grammes. 9-10 fine.	Change per cent. of weight proposed.	Resulting weight in grammes.	Value in Soldos.	Value in Dol- lars. (Internat. Monal.)
United States....	3 Double Eagles.....	100.309	-0.31	100.00	100	60.00
"	3 Eagles.....	50.154	-0.31	50.00	50	30.00
"	3 Half Eagles.....	25.077	-0.31	25.00	25	15.00
"	3 Dollars.....	5.015	-0.31	5.00	5	3.00
Great Britain....	Sovereign.....	8.136	-1.67	8.00	8	4.80
"	Half Sovereign.....	4.068	-1.67	4.00	4	2.40
France.....	Napoleon.....	6.452	+0.74	6.20	6½	3.90
"	Piece of 10 Francs.....	3.226	+0.74	3.25	3½	1.95
Spain.....	3 Doublons.....	25.161	-0.64	25.00	25	15.00
Portugal.....	Coroa.....	18.099	-0.55	18.00	18	10.80
Muntzverein....	3 Triple Crowns.....	100.000	0.00	100.00	100	60.00
"	9 Crowns.....	100.000	0.00	100.00	100	60.00
Holland.....	Guillaume..	6.729	+0.31	6.75	6½	4.05
"	Ducat.....	3.817	-1.78	3.75	3½	2.25
"	Ryder.....	.....	.....	10.00	10	6.00
"	Half Ryder.....	.....	.....	5.00	5	3.00
Russia.....	3 Polous Imperial.....	19.161	-0.85	19.00	19	11.40
Mexico.....	Doublon (new).....	25.963	+0.14	26.00	26	15.60
"	Piece 20 Pesos.....	32.840	+0.49	33.00	33	19.80
Bolivia.....	Doublon.....	26.068	-0.26	26.00	26	15.60
Ecuador.....	Piece 4 Escudos.....	12.630	-1.03	12.50	12½	7.50
Brazil.....	Piece 10 Milreis.....	9.122	+0.48	9.16 +	9½	5.50
Peru.....	Piece 20 Soles.....	32.120	-0.37	32.00	32	19.20
Turkey.....	Piece 100 Piastres.....	7.805	+2.67	7.50	7½	4.50
Tunis.....	Piece 25 Piastres.....	5.008	-0.16	5.00	5	3.00
Egypt.....	3 Egyptian Guineas.....	24.306	+0.37	25.00	25	15.00
Japan.....	Cobang (new).....	5.713	+0.65	5.75	5½	3.45

The proposition of the American Department of State, which makes the decigramme of pure gold the common measure of value affords the following relations, which are here introduced for the purpose of comparison:

Country.	Denomination of Money.	Present weight in decigrammes and decimal fractions of pure gold.	Proposed weight.	Percentage of change.
United States.....	Half Eagle.....	75.232	75	$-\frac{3}{10}$
Great Britain.....	Sovereign.....	72.224	73	$-\frac{1}{3}$
France .....	Napoleon.....	58.065	58	$-\frac{1}{12}$
Prussia.....	Frederick d'or, prior to 1858.....	60.302	60	$-\frac{1}{2}$
Austria ...	Double Ducat.....	68.836	69	$+\frac{1}{4}$
Muntzverein.....	Crown.....	100.000	100	
Russia.....	Half Imperial.....	59.987	60	$+\frac{1}{30}$
Spain .....	Doublon of 10 Escudos since 1864.....	75.486	75	$-\frac{2}{3}$

The objections which may be made to the unit proposed in this Code, are objections which may be urged against the introduction of any international unit of money. They are found in the inconvenience which will be temporarily experienced in those countries in which the change in the standard of value may disturb, to some extent, the adjustment of prices to commodities, and may require special legislation to secure the equitable fulfillment of contracts; and also in the trouble and expense attendant on the calling in of a coinage which the new system may have rendered unserviceable. But these disadvantages are inseparable from the nature of the reform itself, whatever may be the special shape in which it comes; and if the reform is to be accomplished, they must be encountered. No other plan of unification hitherto proposed has justified the promise that its introduction could be effected with fewer temporary disadvantages than must attend this.

*What gold coins shall be legal tender.*

**500.** All gold coins, of the value of the dollar, or of multiples of the dollar by the whole numbers, two, five, ten, twenty, or fifty, which may be struck by any nation, and which, in respect to weight and fineness, shall be originally within the limits specified in article 503, and shall not have become diminished by abrasion, fraud or otherwise, below the lowest of these limits, shall be a legal tender at their nominal value for payments of any amount in any place within the jurisdiction <sup>1</sup> of any of the nations.

<sup>1</sup> See Title VIII.

*Silver coinage.*

**501.** Silver coins of the value of one dollar, or any fraction of a dollar, may be issued to facilitate the minor transactions of business ; and such coins shall be composed of an alloy, consisting of nine parts of pure silver to one part of base metal, and shall have a weight equal to fifteen times the weight, which, under the provisions of this Code, is prescribed for gold coins of the same nominal value, respectively.

The present ratio of gold to silver, in respect to value at the mints of the United States, is 14.88 to 1, as between the gold coinage and the fractional silver ; and 16 to 1 as between the gold coinage and the silver dollar. The silver dollar, being worth more than its nominal value, has nearly disappeared from circulation. The relative value of these metals has largely varied during the last five or six centuries in Europe. Under Henry III. in England, it stood less than 10 to 1 ; and at the commencement of the coinage of gold under Edward III., in the fourteenth century, it was about  $12\frac{1}{2}$  to 1. (*Mr. E. B. Elliott, in Blake's Report on the Precious Metals. Reports of the Am. Com'rs to Paris Exposition.*) To this point it returned, after numerous oscillations, at the commencement of the seventeenth century ; after which time it continued on the whole to increase until 1848, when it was 15.83 to 1. This was the culminating point. Since the opening of the Californian and Australian gold fields, there has been a slight reaction ; but the effect in this respect of the very large increase in the production of gold, has been much less than might reasonably have been anticipated. Mr. *Elliott* puts the ratio at present at 15.38 to 1. (*Blake's Report, above cited.*) It is possibly somewhat less. The French mint ratio, in the case of the silver five-franc piece, is 15.5 to 1. This piece, therefore, has nearly disappeared. The French mint ratio, in respect to the two-franc, one-franc, and fractional silver coins, is 14.38 to 1. The British mint ratio is 14.28 to 1. The ratio, 15 to 1, adopted in this Code, is convenient, and very near the truth ; the error being in favor of the preservation of the coin from the melting-pot.

*What silver coin shall be legal tender, and to what extent.*

**502.** The silver coins issued under the last article, when the same shall, in respect to weight and fineness, be within the limits prescribed in article 503, shall be a legal tender at their nominal value, in any place within the jurisdiction of any of the nations ; in the case of the silver dollar, for payments not exceeding ten dollars ; and in the case of

“ fractional silver coins, for payments not exceeding five dollars.

*Limits of variation from standard weight or fineness within which coins shall be current.*

503. In the preparation of the coins authorized by this Code, there shall be allowed a deviation from the standard weight and fineness, prescribed in articles 498, 499 and 501, of the amounts following, to wit :

1. In respect to weight :

For gold coins, one one-hundredth part of the square root of the weight expressed in tergrammes.

For silver coins, one one-hundredth part of the square root of the weight expressed in pentagrammes.<sup>1</sup>

And the foregoing rules shall be applicable to coins weighed in bulk as well as to single pieces.

2. In respect to fineness :

For gold coins ; one part in one thousand.

For silver coins ; two parts in one thousand.

The rules in regard to tolerance of variations have heretofore been arbitrary. The British law makes the tolerance for gold coins two one-thousandths of the total weight; and for silver coins, four one-thousandths of the total weight. (33 *Vict.* c. 10, § 20.) The amount of deviation from the standard allowed is, therefore, directly proportioned to the weight of the coin. There would be reason in this, if the tolerance were near the turning weight of the balance ; but as it is immensely greater, (say from one hundred to ten thousand times greater,) the tolerance allowed in large coins should be in much less proportion to the weight than that permitted in small coins.

The law of the United States, (*Act of Congress of Jan. 18, 1837*), for a considerable period of time, allowed the same absolute amount of variation of weight (one-quarter of a grain) for all gold coins ; which was equivalent to something less than one two-thousandth part of the double eagle,\* and one one-hundredth part for the dollar. At the present time the allowance is one-half a grain for the double eagle, eagle and half eagle, and one-quarter of a grain for the quarter eagle and dollar. (*Act of Congress, of Mar. 3, 1849*.)

The proportion, therefore, varies from about one one-thousandth (in the double eagle) to one one-hundredth (in the dollar).

For silver coins, the allowance is one and a half grains on the dollar † and half dollar, one grain on the quarter dollar, and a half grain on the

\* The double eagle, 516 gr. The eagle, 258 gr. The half eagle, 129 gr. The quarter eagle, 64.5 gr. The dollar, 25.8.

† The dollar, 412.5 gr. The half dollar, 192 gr. The quarter dollar, 96 gr. The dime, 38.4 gr. The half dime, 19.2.

lesser coins, varying from one two hundred and seventy-fifth to about one-fortieth. For gold, in masses of one thousand pieces, the allowance varies from one-seven-thousandth (for double eagles) to one-twenty-seven-hundredth (for the quarter eagles;) and for silver, from one one-hundredth (for the dollar,) to one-sixteen-hundredth (for dimes.) *Act of Congress, of Jan. 18, 1837.*

According to the law of probabilities in respect to the numerical results of experiment or observation, the probable error should vary as the square root of the total number. If, therefore, a just allowance can be empirically determined for a given coin, the allowance for any number may be readily deduced from the law of the square roots. The same law will also fairly represent the allowance for single coins of different weights, after the proper allowance for one representing the unit of weight shall have been ascertained.

The numerical *constants* introduced into this Article are derived from the determinations of Mr. *E. B. Elliott*, Statistician of the United States Treasury.

<sup>1</sup> The term pentagramme, formed upon the principles of the metric nomenclature, signifies *five grammes*.

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It seems proper to present the ratio of the tolerated variations of weight to the total weight of the several coins, as the result from the rule laid down in this Article; the corresponding ratios tolerated by the Statutes of Great Britain and the United States having been above given. A formula may be constructed for computing these ratios, equally for gold and for silver at the same time, by taking advantage of the convenient circumstances, that, inasmuch as one pentagramme is equivalent to fifteen tergrammes, therefore, a gold coin weighing any given number of tergrammes will have, according to the relation defined in Article 501, the same value as a silver coin weighing the same number of pentagrammes.

Then putting  $W$  for the weight of a coin, and  $T$  for the variation of weight tolerated;  $W_t$ ,  $W_p$  and  $T_t$ ,  $T_p$ , for the weight and tolerance in tergrammes and pentagrammes respectively; we shall have, in accordance with the rule of this Article,—

$\frac{1}{100} \sqrt{W_t} = T_p$ , the variation tolerated in gold coins, referred to the tergramme as a unit; and,

$\frac{1}{100} \sqrt{W_p} = T_t$ , the corresponding variation for silver coins, referred to the pentagramme as a unit.

$$\text{Also, } \frac{T_t}{W_t} = \frac{T_p}{W_p} = \frac{1}{100} \frac{\sqrt{W}}{W} = \frac{1}{100 \sqrt{W}}$$

That is to say, the ratio of tolerance to weight, for coins of either gold or silver, is found in dividing unity by one hundred times the square root of the weight; the quotient being tergrammes in the first instance, and pentagrammes in the second. If we, therefore, put  $W=1$ , the tolerance is one one-hundredth part of the weight. One tergramme of gold, or one



pentagramme of silver, has the value of one-fifth of a dollar = one franc (international) = 1-25th of a sovereign (international) = twenty cents. The variation of value tolerated by the rule, in a coin of this weight, would therefore amount to one one-hundredth of twenty cents, or one-fifth of one cent. The variations of weight and value tolerated in coins in which *W* is greater or less than unity, are given for the cases most likely to occur in actual coinage, in the following table; in which the weights are to be read as pentagrammes for silver coins, and as ter-grammes for gold coins.

*Weight, tolerated variation of weight, and tolerated variation of value in gold and silver coins, as determined by the rule of Article 503 of this Code; compared with the same as fixed by the statutes of Great Britain and the United States.*

Coins.	Weight. ter-grammes for gold. Pen- tagrammes for silver.	Tolerated va- riation of weight.	Ratio of toler- ance to total weight.	Tolerated va- riation of value.	Total variation of value by	
					British statute.	U. S. statute.
Half Dime = $\$2\frac{1}{2}$ (silver)....	0.25	0.005	$\frac{1}{50}$	0.001	\$0.0002	\$0.0013
Dime = $\$1\frac{1}{10}$ " ...	0.50	0.007	$\frac{1}{70.7}$	0.0014	0.0004	0.0013
Franc = $\$1\frac{1}{6}$ " ....	1.00	0.01	$\frac{1}{100}$	0.002	0.0008	0.0013
Quarter Dollar " ....	1.25	0.0112	$\frac{1}{111.8}$	0.00204	0.001	0.0026
Half Dollar " ....	2.50	0.0158	$\frac{1}{63.1}$	0.0032	0.002	0.00391
Dollar (gold or silver).....	5.00	0.0224	$\frac{1}{223.8}$	0.00447	{ 0.004* 0.002†	{ 0.00364 0.0097
Quarter Eagle = $\$2\frac{1}{2}$ (gold)..	12.50	1.0264	$\frac{1}{353.8}$	0.00707	0.005	0.0097
Half Eagle = \$5 " ..	25.00	0.05	$\frac{1}{500}$	0.01	0.01	0.0194
Eagle = \$10 " ..	50.00	0.0707	$\frac{1}{707.1}$	0.01414	0.02	0.0194
Double Eagle = \$20 " ..	100.00	0.1	$\frac{1}{1000}$	0.02	0.04	0.0194
1000 Eagles = \$10,000 " ..	50,000.00	2.2861	$\frac{1}{22361}$	0.447	20.00	1.8605
1000 Double Eagles } = \$20,000 " ..	100,000.00	3.1623	$\frac{1}{31623}$	0.632	40.00	2.7907
5000 Eagles = \$50,000 " ..	250,000.00	5.00	$\frac{1}{50000}$	1.00	100.00	9.3025
10,000 Double Eagles } = \$200,000 " ..	1,000,000.00	10.00	$\frac{1}{100000}$	2.00	400.00	27.9070

\* Silver.

† Gold.

The tolerance of variation in value, as given in the last column but one in the above table, is computed according to the British rule, although the coins named are not issued by the British mint. The mint of the United States coins all that are named, except the franc or double dime. The British tolerance for small silver coins is too low, and for large gold coins too large. The British statute provides no different rule for tolerance of single coins, and for coin in masses. Hence the variations in the last four examples in the table are excessive. It will be seen, however, that, by the rule given in this Code, the results are entirely consistent; and the computed tolerances are quite reasonable, whether coins are considered singly or in bulk.

The *exact* provisions of the United States statute for tolerance of variation in the weight of masses of coin, are :

*For Gold.*

In 1000 Double Eagles (= 516,000 grains), 3 dwt.—Ratio,	$\frac{72}{516000} = \frac{1}{7166\cdot6}$
In 1000 Eagles (= 258,000 “ ), 2 “ “	$\frac{48}{258000} = \frac{1}{5375}$
In 1000 Half Eagles (= 129,000 “ ), 1½ “ “	$\frac{36}{129000} = \frac{1}{3583\cdot3}$
In 1000 Quarter Eagles (= 64,500 “ ), 1 “ “	$\frac{24}{64500} = \frac{1}{2687\cdot5}$
In 1000 Dollars (= 25,800 “ ), ½ “ “	$\frac{12}{25800} = \frac{1}{2150}$

*For Silver.*

In 1000 Dollars (= 412,500 grains), 4 dwt.—Ratio,	$\frac{96}{412500} = \frac{1}{4296\cdot9}$
In 1000 Half Dollars (= 192,000 “ ), 3 “ “	$\frac{72}{192000} = \frac{1}{2666\cdot6}$
In 1000 Quarter Dollars (= 96,000 “ ), 2 “ “	$\frac{48}{96000} = \frac{1}{2000}$
In 1000 Dimes (= 38,400 “ ), 1 “ “	$\frac{24}{38400} = \frac{1}{1600}$
In 1000 Half Dimes (= 19,200 “ ), 1 “ “	$\frac{24}{19200} = \frac{1}{800}$

The coinage of the Empire of Japan was remodelled in 1870 ; so as, in respect to gold coins at least, to be entirely in accordance with the scheme of international coinage proposed in the title “ Money ” of this Code, and in 1875, the same system except in nomenclature was adopted in the Argentine Republic. In Japan, gold is made the standard, and gold coins are the only legal tender, except for small sums ; and except also, but only in the open ports, as it respects a coin of silver equivalent to the silver dollar ; which in the present state of oriental commerce it seems to be necessary to retain. The standard of fineness for the gold coins, and also for the silver *one-yen* (dollar) is nine-tenths. But the standard of fineness for the subsidiary silver is only eight-tenths. The *yen* is the unit of account, and its representative gold coin contains one gramme and a half of pure gold, or one gramme and two-thirds (five tergrammes) of standard gold ; thus corresponding exactly to the international dollar of this Code.

The following tables exhibit the entire system of the Japanese coinage as at present established.\*

*Table of the weight of the gold coins. Standard fineness, 9-10.*

Yens.	Pure Gold.		Standard weight.	
	Weight in Grammes.	Weight in Grains.	Weight in Grammes.	Weight in Grains.
20	30	462·97	33½	514·41
10	15	231·48	16½	257·20
5	7½	115·74	8½	128·60
2	3	46·29	3½	51·44
1	1½	23·15	1½	25·72

\* For the interesting information relating to this important measure of

*Table of the subsidiary silver coins. Standard fineness, 8-10.*

Sens.	Pure Silver.		Standard weight.	
	Weight in Grammes.	Weight in Grains.	Weight in Grammes.	Weight in Grains.
50	10.00	154.4	12.5	193.0
20	4.00	61.76	5.00	77.2
10	2.00	30.88	2.00	38.6
5	1.00	15.44	1.25	19.3

*Table of the subsidiary copper coins.*

Coins.	Weight in Grammes.	Weight in Grains.
One Sen .....	7.13	110
Half Sen.....	3.56	55
One Rin .....	0.90	14

*Table of the silver one-yen. Standard fineness, 9-10.*

	Pure Silver.		Standard Weight.	
	Weight in Grammes.	Weight in Grains.	Weight in Grammes.	Weight in Grains.
One Yen.....	24.260726	374.4	26.356363	416

“ Each kind of the gold coins, namely : Twenty (20) yen, ten (10) yen, five (5) yen, two (2) yen and one (1) yen, among which the last, namely the one yen, is the legal standard, will be the legal tender in all payments to any amount.

“ Each kind of the silver coins, except the silver one yen, will be subsidiary coins, and legal tender for the payment of sums not exceeding ten (10) yen in any one payment, whether the payment is made in one of these coins or in several.

“ Each of the subsidiary copper coins, namely, one (1) sen, one-half ( $\frac{1}{2}$ ) sen, and one-tenth ( $\frac{1}{10}$ ) of one sen, will be legal tender in payment of sums not exceeding one (1) yen in any one payment.

“ For the sake of rendering facility to foreigners at those ports open to them, and in accordance with the requirement of the traders, both foreign and Japanese, the government will coin the silver one yen and make it

monetary reform, instituted with such decision in the newly awakened but eminently progressive empire of Japan, we are indebted to the courtesy of Mr. J. H. SAVILLE, chief clerk of the Treasury Department of the United States at Washington.

useful only for foreign commerce. This silver one-yen will be the legal tender in payment of local taxes and of import and export duties. It will also be the legal tender in any commercial transaction in the open ports. This silver one-yen will, however, not be the legal tender in any other place than the open ports, and will not be used for the payment of internal revenue of any kind, nor will it be lawful currency in the interior; though, by mutual agreement, any persons may use it to any amount throughout Japan. In the payment of the import and export duties, the comparative rate of the gold yen to the silver one-yen, will for the present be this: One hundred (100) silver one-yen to be equivalent to one hundred and one (101) gold yen."

#### *Standard weights.*

**504.** Standard weights shall be prepared for testing the coins issued by the several mints, including weights exactly representing each of the several gold and silver coins, made by this Code a legal tender in payment of debts. These weights shall be carefully compared and exactly verified by an international commission, composed of experts appointed by the governments of the nations parties to this Code, each government appointing at least one and not more than two delegates; such commission to assemble at a convenient time and place to be agreed upon between the several governments. The weights so verified shall be deposited in the several mints, with such provisions for their safe-keeping as may secure them effectually from falsification, and also, as far as may be, from deterioration by exposure or use. There shall furthermore be made copies of these standard weights for the ordinary uses of the several mints, which copies shall, at least once a year, be carefully compared with the standard weights and duly verified; and these standard weights shall be used for no other purpose whatever, but to make such comparisons and verifications.

#### *Scrutiny of the coinage.*

**505.** At every delivery of coins made by the coining officers of any nation to the public treasury of the same, there shall be taken indiscriminately, by the treasurer or other officer duly authorized, a sufficient number of pieces of each variety of coin delivered, to

be reserved for assay and scrutiny;<sup>1</sup> and the coins so taken shall be carefully enclosed and sealed, with a label stating their descriptions, numbers and value, and deposited in a strong box or safe so secured that it cannot be opened except by the concurrence of the superintendent of the mint and the officer representing the treasury. At a suitable time after the close of the mint operations of each year, the coins so reserved shall be subjected to scrutiny by a commission of experts to be appointed by the government,<sup>2</sup> who shall, after thorough examination, make report as to the conformity of those pieces to the standards of fineness and weight. Should there be found a deviation from the standards greater than that which is allowed by the provisions of this Code, all officers implicated in the error shall be thenceforward disqualified from holding their respective offices, or subjected to such other penalty as may be provided by the municipal law of the State to which the mint appertains; except that, if, in view of the circumstances, it shall appear that the error has not been caused by fraud, neglect, or incapacity, the penalty shall not be inflicted.<sup>3</sup>

<sup>1</sup> *Act of Congress, U. S., January 18, 1837, §§ 27, 32.*

<sup>2</sup> *British Coinage Act, 33 Vict. ch. 10, § 12.*

<sup>3</sup> *Act of Congress, U. S., January 18, 1837.*

*Coins may be called in by proclamation.*

**506.** A nation may call in the coins of any date or denomination issued by it; in which case, after public proclamation shall have been made of such recall, the coins specified in the proclamation shall cease everywhere to be a legal tender. But in every such case, provision shall be made for redeeming the coins at their actual value, and for furnishing current coin instead thereof, at the capitals or principal financial centres of the several countries within which they have been in circulation.

*Uncurrent coins may be destroyed.*

**507.** When any gold coin of a denomination made

current by the provisions of this Code shall be below the standard weight by an amount greater than the largest deviation allowed by the same, or when any coin shall have been called in by proclamation,<sup>1</sup> it shall be the duty of every person to whom such coin may be tendered in any payment, to cut, break or deface such coin; and the person tendering it shall bear the loss. If any coin cut, broken or defaced, in pursuance of this article, shall prove not to be below the current weight, or not to have been called in by proclamation, the person cutting, breaking or defacing the same shall receive the same in payment according to its denomination. Any dispute arising under this article may be determined by a summary proceeding, to be prescribed by each nation for itself.<sup>1</sup>

<sup>1</sup> *British Coinage Act, 33 Vict., ch. 10, § 7.*

*Coins of base metal not to form a part of the international currency.*

**508.** No coin or token of copper, bronze, nickel or any other base metal or mixture of metals, which may be issued by the government of any nation to subserve the purposes of money, shall be a legal tender for payment of any amount, in any place within the jurisdiction of any nation except that by which it was issued.

## TITLE XXI.

## WEIGHTS AND MEASURES.

The systems of weights and measures in actual use among different peoples, stand to each other in no simple numerical relations ; and the transformation of values from one of these systems to another, is ordinarily an irksome and time-consuming operation. No common system could therefore be substituted for all these, which would not stand to them or to most of them in the same relation of inexact commensurability in which they stand to each other. But there is hardly a transaction of practical life into which considerations of weight, or measure, or both, do not enter ; and such is the constitution of the human mind that clear conceptions of quantities of any kind are unattainable, except by reference to unit values, which education or long use has made familiar. It matters not how thoroughly we may have been instructed in the denominations of weight and measure employed by other peoples, or how earnestly we may have endeavored, by the study of their visible types placed immediately before our eyes, to acquire the power of directly conceiving positive values, when expressed in these : experience teaches us that our notions thus acquired continue long to be vague and inexact ; and that, in order to render them definite, intelligible and satisfactory, we involuntarily seek to transform them, by reductions founded upon relations which, if not true, are at least approximate, into values which long habit has taught us to associate directly with determinate quantities of the objects valued. The substitution, therefore, anywhere, of a new system of weights and measures for the system actually in use, founded as the new system must be, if it is to become a common and international system, upon a basis which will generally bear no simple numerical relation to the basis of the existing system, will impose upon an entire generation such a burden of inconvenience, daily and hourly felt, as to require for its justification very clear demonstration that the advantages to be secured by the substitution are much more than an offset to this very serious inconvenience. And as there are many minds in which considerations of great public benefit, or even of great individual benefit, which is only prospective, will after all weigh little in comparison with a much less amount of present and personal inconvenience, it is inevitable that every proposition for the unification of the systems of weights and measures in use in the world, no matter what may be the basis proposed for the new system, or what may be its theoretic simplicity, will meet with determined opposition in many quarters.

But the inconvenience here referred to, which consists in interference with men's established habits of thought, is not the only one which nec-

essarily results from the abrogation of a system of weights and measures after it has been long in use, and the substitution in its place of a new system, even though it be a greatly better one. That inconvenience can be but temporary, and can affect, at farthest, but a single generation. To abolish suddenly the metric system of weights and measures in France, at the present day, would be to compel the French people to pass a second time through the same painful struggle with established associations as that which attended its original introduction.

But apart from this, every system of weights and measures long in use becomes inevitably entangled in, or incorporated with, the operations of industry or the material interests of men, to the extent that it constitutes at length an element in the actual value of many descriptions of property. The disadvantage which must arise from this source, in case of the abolition of the system, is one of a more permanent, and apart from its permanence, of a more serious nature than any which can spring from the mere violence done to mental associations.

The artificial divisions of landed property are among the things least liable to change among men; and the boundary lines which mark these divisions are naturally expressed, whenever that is possible, in integral numbers of the unit of measure employed. The introduction of a new unit having no simple relation to the first, will make all these values fractional. And the importance of this consideration increases in proportion as the dimensions of the divisions are less, and the absolute value of the surface measured is greater. These are the conditions which exist in regard to the real estate of cities, where they are true as well of buildings as of the ground on which the buildings are erected.

Again, the dimensions of railways, and of the locomotives and other rolling stock used in operating them, have been determined in conformity with the existing systems of measurement; and all these too become fractional numbers when the system is changed. The same thing must occur in every department of mechanical manufacture, where both the objects produced, and the machinery by which they are produced, will cease, with a change of system, to possess dimensions capable of being integrally expressed. When we consider into how many details of manufacturing art the exactest measurements enter as elements of vital importance, and reflect at the same time what vast sums have been invested in the various forms of mechanical production, and made dependent for their returns of profit upon the stability of existing systems of measurement, we shall perceive that the sudden introduction of others, and their immediate extension to every department of industry as well as commerce, would seriously and injuriously affect some of the most important springs of public and of private wealth.

If, however, in view of all the possible consequences which may and must result from the substitution of a system of weights and measures uniform for all nations, in place of the numerous, diverse, and greatly incongruous systems at present in use, it shall appear that there are permanent and lasting advantages to be secured to mankind by the change, sufficient to outweigh the temporary inconvenience and possible confusion



which it may cause, there can be no doubt that means ought to be taken to insure the introduction of such a system at as early a day as may be practicable with a due consideration for the tenacity with which men cling to established usages, and a due regard to the material interests which are likely to be affected by it.

But, supposing the first question to be thus disposed of, and the desirableness of a common system of weights and measures for use among all nations to be universally admitted, there remains behind a second question of hardly less difficulty, which is to determine among the various systems which may be suggested, that which combines in itself the largest number of practical advantages, and which is therefore intrinsically the best. And here it may be remarked, that many existing systems are so exceedingly bad, so arbitrary in the assumptions of the units upon which they rest, so variable in the absolute values of these units in different provinces or districts of the same countries, and often in their details so inconsistent with themselves, as to call for reform in the interest simply of the peoples who use them, and without regard to the relations of these peoples with contemporary nations. Since, therefore, no system of weights and measures which may be proposed for international use can have any chance of acceptance, unless it shall be in itself very manifestly a good system, it follows that many of the arguments which may be urged in favor of the adoption of an international system, will be arguments of weight in favor of the system itself, independently of its international character.

The disadvantages which result from the great number and diversity of existing weights and measures, are too obvious to require extended illustration. They are felt by all men engaged in effecting the world's exchanges, in the oppressive burden of arithmetical computations with which they incur all their operations. They are felt by statesmen and statisticians in the difficulties with which they surround all inquiries relating to the resources and the wealth of nations. They are felt by engineers, mechanical artisans and manufacturers, in the greatly increased labor to which they subject such persons, whenever they seek to inform themselves of the improvements in the sciences of construction, or in the practical arts of life, taking place in other lands, in order that they may profit by them. They are felt by travelers and tourists, in the obstacles which they interpose to their proper understanding of what they see and hear in regard to the countries which they visit, and the liability to which they expose them, of taking up erroneous impressions, which, through the publication of their observations, are often conveyed to others. And as it respects all historical or archæological research, not only the diversity of weights and measures existing at present, but the instability of those standards in the past, and the extreme uncertainty which accompanies any attempt to fix their absolute value at any given period of remote antiquity, throws around many questions of the deepest interest an obscurity which no patience of investigation will ever be able to remove.

The desirableness of a uniform system of weights and measures, to be

used in common by all mankind, is, however, too obvious to admit of any difference of opinion. If between any two individual men, in order to the interchange of material objects, or even in order to the interchange of intelligent thought, it is necessary that there should exist some standard or standards of value recognized by both, the same is true, in a much higher degree, of large communities of men; and by an extension of the reasoning, the same is just as true of all mankind. It is proper to observe, however, that the same is not just as true of all mankind, except on the supposition that relations of frequent commercial, social or intellectual intercourse are established between all the branches of the great human family; and therefore that it has not had always in the past the same importance which it has in the present; nor has it at this time the same magnitude of importance which it is destined to have in the future.

Writers who have endeavored to trace the origin of the weights and measures which we find prevailing among ourselves at the present time, inform us that, in a primitive state of society, men found in the dimensions of their own bodies or of its members, the prototypes of their original linear measures. Two reasons conspire to make such a derivation natural. In the first place, the first uses which the uncivilized human being will have for measures, will be for the construction of his habitation, of his garments, of the rude implements which he employs to facilitate his labor, or of the weapons with which he pursues his game. These must of course bear some convenient proportion of dimensions to the person who intends them for his own use. But, in the second place, the idea of an artificial and material scale or rule for the measurement of objects, is one which involves processes of reflection and abstraction which primitive man has not yet learned to use; while his own person, with its several members, is ever present, not merely as a measure, but as the very thing which is to be accommodated and fitted by means of the earliest constructions for which measurements are made. As in the course of time more numerous comparisons become necessary, the same standards of measurement are naturally applied in making them.

In the measurement of distances, another idea suggests itself, equally growing out of the condition and habits of primitive man. Before man had learned to subjugate animals to his service, his only means of locomotion were such as he possessed in common with these; and in estimating the moderate distances from his dwelling to which his daily walks might extend, nothing could more naturally suggest itself than to count his steps. From this arose the fundamental unit of itinerary measure, which is still more or less employed for rude determinations; *i. e.*, the pace.

In the state of society here supposed, each man will be his own standard. And though the persons of different individuals differ sensibly in dimensions, yet in the transactions which may occur between the members of a community so rude, these differences will be unimportant; more especially when it is considered that no series of successive measure-

ments, made by the same individual, by means of a standard so imperfect, are likely to be more than mere approximations to equality. As civilization advances, and society becomes more perfectly organized, and exchanges multiply, and men, looking beyond the mere supply of their daily wants, aim at the accumulation of wealth, the necessity will be felt of greater uniformity and more exactness in measurements, and an artificial and constant standard will, by common consent, be adopted to supersede the natural and variable one; but this will still bear the same name (the foot for instance) as the standard superseded, and will be designed to represent its average value.\* Such conventions will at first extend only to limited districts, and different districts will have different artificial standards, agreeing in name and according approximately, but only approximately, in value. It is thus that there early originated in different countries of Europe, and in different provinces of those countries, more than one hundred different units of measure, all bearing the name *pous*, *pes*, *pied*, *pié*, *pé*, *fuss*, *fod*, *fot*, *foute*, or *foot*, and all equally signifying the derivation of the measure from the average length of the human foot; a value, however, which in many instances it exceeds, (as in England and the United States,) and in some, (as in Portugal and many of the Italian States,) largely. The greater number of these discordant measures have disappeared, chiefly in consequence of the extension of the metric system, which now prevails in France, Belgium, Holland, Italy, Spain, Portugal and Greece. Nevertheless, at the Exposition of Weights and Measures in Paris, made in connection with the Universal industrial Exposition of 1867, there were exhibited thirteen† units of measure as being then in actual use under the name of foot, (or its equivalent in other languages,) among which were found eight different absolute lengths.

The history of the origin of existing weights and measures is interesting, inasmuch as it is a part of the history of the human race. But in its bearing upon the question, what ought to be the standards adopted by men in a high state of civilization, it is of no importance whatever. Yet the foot-measure has been strongly advocated in our own time, on the score that it is a natural measure, suggested by a sort of instinct, which

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\* Instead of being taken at an average value, this unit of linear measure may have been derived from the person of some conspicuous individual. Thus the Olympic foot-measure of the Greeks is said to have been taken from the foot of Hercules; and the French *pied du roi* should seem from its name to have had a similar origin. We find it also stated that the English yard was derived from the length of the arm of Henry I. in 1101; the length of this measure, previously to the Norman conquest, having been somewhat greater than that of the modern metre.

† The measures here referred to were from Prussia, Bavaria, Wurtemberg, Baden, Hesse, Switzerland, Austria, Denmark, Sweden, Norway, Russia, Great Britain and the United States. The foot-measures of Great Britain, Russia and the United States are identical; also those of Switzerland and Baden. Those of Prussia, Denmark and Norway are very nearly so. The rest are more or less different from either of these; but the foot-measures of Baden, Hesse and Switzerland have metric values.

its almost universal prevalence shows to have been universal. In the gift of reason, however, man has been furnished with a guide superior to instinct; and there is no more propriety in requiring that human society, in the maturity of its intellectual development, should be controlled by the instincts of its infancy, than that the fantasies of childhood should give law to the adult individual.

There is no system of weights and measures anywhere existing, unless it be the metric system, which is not so faulty as to demand reconstruction in many important particulars, without regard to the question of international uniformity, and solely in the interest of the people themselves by whom it is used. Take, for instance, the system which prevails in Great Britain and the United States. For moderate magnitudes, the foot is no doubt a convenient measure of length. It would probably be quite as convenient, and would still more nearly approach the average length of the member from which it purports to have been taken, if it were reduced by a sixth part. A foot twelve inches in length may have been the average foot of some giant race of aboriginal anthropophagi, but it is not the average foot of the civilized man of modern times. \*

This foot is much more truly represented by the fourth part of a metre than by the third part of a British or American yard. But either this true foot, which we do not use, or the artificial and imaginary foot, which we do, is, as just observed, a sufficiently convenient unit for moderate measurements, though it is by no means the most so.

It is unfortunately, but very decidedly, too small to be capable of being made most largely useful; yet, since the artificial foot has an established existence, and has become an integral part of every ordinary conception of material magnitude among the peoples who use it, its inferiority of possible usefulness would not be a sufficient argument for setting it aside, if its use were already universal, or there were any reasonable probability that it could ever be made so. But such is neither the fact nor the probability.

The unit of length, which we find mentioned in the earliest written records extant, viz., the historic books of the Old Testament, and which was in use in antediluvian times, as well as later, among the Hebrews and the Egyptians, was the cubit—a measure greater than the foot, and equal in some instances to about half a modern British yard, and in others to more than half a metre. † The yard, which is three times the

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\* In the volume of "*Investigations in the Military and Antropological Statistics of American Soldiers*," by Dr. B. A. Gould," published among the Memoirs of the United States Sanitary Commission, are given some interesting results upon the measurement of the length of the adult human foot. Nearly sixteen thousand individuals, of very various races and nationalities, were subjected to measurement, of whom about eleven thousand were white men. Dr. Gould says, "The mean length was found for no nationality to exceed 10.24 inches, and for none to fall below 9.89 inches—the value for the total being 10.058 inches."

† Among the collected works of Professor John Greaves, of Oxford,

length of the foot, is also in use among ourselves as a standard unit for the measurement of all textile fabrics, and all yarns, threads, twines and other articles formed by spinning. The lengths of both these units, the cubit and the yard, are derived, like that of the foot, from the human body; the cubit being the length of the forearm, taken externally from the elbow to the end of the extended middle finger; and the yard, the length of the entire outstretched arm and open hand, measured, however, not from the shoulder, but from the middle of the face, or (where this mode of measurement is still actually practised, as it sometimes is) from the tip of the nose—a feature which furnishes a very definite point of reference. We find in this last mentioned fact a very obvious explanation of the usage which has practically restricted the use of the yard to the measurement of articles of a light and portable, and usually flexible nature, and which has prevented its application to immovable and solid objects.\* The savage could stretch along his arm the thong designed to string his bow, and bring the extremity to his lips, and he could measure off with his feet the space designed for the floor of his wigwam, and apply his forearm to its walls; but he could not so conveniently measure the thong upon his foot or his forearm, nor would he willingly apply his face to the surface of a solid, or to that of the earth. For this reason, the yard measure, which, for the purposes to which it is actually ap-

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edited by *Thomas Birch*, M.A., and published in London in 1737, is contained a “Dissertation on Cubits,” by *Sir Isaac Newton*, originally written in Latin, in which are given the results of his investigations as to the length of ancient cubits, as follows:

	British feet. Inches.	
Cubit of Memphis, (from exterior of Great Pyramid).....	1'732	20'784
“ “ (from King's Chamber in “ ).....	1'719	20'628
“ “ (from Gallery “ “ ).....	1'717	20'604
Cubit of Babylon.....	very nearly 2'000	24'000
Royal Cubit of Persia.....	1'7663	21'1950
Sacred Cubit of Moses, not greater than.....	2'0782	24'9389
“ “ not less than.....	2'0605	24'7262
“ “ probable value....	2'0629	24'7552
Cubit of the Romans.....	1'4505	17'4060
Cubit of the Greeks.....	probably 1'5109	18'1308
Present Cubit of Egypt, (A. D. 1737).....	1'8240	21'8880

The Dissertation, from which these numbers are taken, has been reprinted by Captain *C. Piazza Smyth*, in the second volume of his “Life, and Work at the Great Pyramid.” Edinburgh, 1867.

\* Mr. *Adams*, in his report, quoted farther on, says, that the yard is a measure of Saxon origin, derived from the circumference or *gyrth* of the body. (Saxon, *gyrdan*, to inclose or surround.) So derived, it belongs to a period in the history of civilization later than that in which men used the person itself, or a portion of it, directly, as a measuring instrument. But, however derived, the most convenient mode of finding the length of the yard, in the absence of an artificial measure, and, therefore, for using it in the measurement of light and flexible articles, would soon be found to be by reference to the arm.

plied, we find so much superior in convenience to the foot, and which seems to have been thus restricted only by the accidents of its origin, or the early mode of its use, failed to become the ordinary measuring unit, to the great disadvantage of all subsequent time. The yard is superior to the foot for the purposes of practical mensuration, in the respect that while it is small enough to be conceived in its whole magnitude by the humblest capacity, and short enough to be conveniently carried in the form of a rule in the hand, it permits considerable dimensions to be expressed in numbers which the mind still easily grasps, while the same dimensions, expressed in feet, transcend the numerical limits within which clear conceptions are possible. As evidence of the truth of this assertion, we have only to appeal to experience. Let any one endeavor to conceive to himself any considerable number of *feet* of silk stuffs, or of carpeting—as, for instance, *eighty-seven*—and he will scarcely be able to form a definite idea of this quantity until after reducing it to the simpler form of twenty-nine yards. An equal advantage would be found in the application of the same unit to the dimensions of buildings, of city lots, and all other objects requiring many repetitions of the unit, were it not that long habit has in such cases reduced considerably the mental effort which the use of the smaller unit exacts.

As it respects dimensions less than the yard, they are now in fact easily provided for by means of binary subdivisions of this unit; and they might be provided for quite as satisfactorily by means of a decimal subdivision. But as the yard is in practice restricted to a narrow range of application, small measurements are commonly made at present in duodecimal divisions of the *foot*, and binary sub-divisions of the *inch*. It is commonly asserted, and that in a manner so dogmatic as to imply that the proposition admits of no argument, that the duodecimal and binary subdivisions of measure and weight are necessarily and in their own nature preferable to any other. However this might be, in case we had a duodecimal or binary system of arithemetical numeration, under the circumstances actually existing it cannot be admitted without many reservations. For it is a fact that, for many purposes, the division of the foot into inches, and of the inch into halves, quarters, eighths and sixteenths, is so positive a disadvantage that it is actually in such cases habitually discarded in favor of a decimal division, which the system does not provide. The carpenter and joiner continue, it is true, to use the duodecimal and binary system in all its details. But the draftsman, the machinist, and the mechanical engineer, while they employ the foot and the inch, discard the binary subdivision of the inch, and substitute the decimal. The civil engineer, again, in his geodetic work, discards the inch, and begins his decimal subdivision directly with the fundamental unit, the foot itself. Finally, the land surveyor, though he employs a multiple unit, or chain, having the absurd relation to the standard of sixty-six to one, yet subdivides again his unit decimally, making his smallest division, a link, sixty-six hundredths of a foot, or seven inches and ninety-two hundredths of an inch.

Next above the yard, in ordinary linear measurement, we have the rod, made up of five and a half yards, or sixteen and a half feet. Or, to avoid fractional expressions, we may say that two rods are equal to eleven yards, or to thirty-three feet. A more inconvenient relation, in the use of numbers so moderate, it would baffle the ingenuity of man to devise. Above the rod we have the furlong, a useless denomination, since it is never used. Above the furlong we have the mile, the ordinary unit of itinerary measurement; and above the mile the league, a denomination which in some countries has also passed out of use. We have, then, a series of denominations of linear measurement, bearing to each other the successive ratios expressed by the following numbers, viz. .

12, 3,  $5\frac{1}{2}$ , 40, 8, 3; so that, 1 league = 3 miles = 24 furlongs = 960 rods = 5,280 yards = 15,840 feet = 190,080 inches.

This system, therefore, which is bad in its basis, is greatly worse in its denominational relations. If it had been contrived with the explicit and perverse design to cut off all connection in conception between the higher denominations and the lower, and to heap up labor for the sake of labor upon the hands of those who use it, it could not have been more successful.

That which is true in this system of measures of linear dimensions, is equally true of the measures of surface, of solidity and capacity which it provides; but after what has preceded, it will hardly be necessary to follow these out through all the inconsistencies of their details. For measures of surface we have the square inch, much used in mechanics and physics and dynamical engineering; the square foot applied to lumber, to city lots, to rolled metals, &c.; the square of carpentry, containing one hundred square feet, employed for wainscoting, roofing and flooring; the square yard, by which house-painters, plasterers and paviors calculate their work; the square rod; the square chain, containing sixteen square rods; the rood, containing forty square rods; and the acre, containing one hundred and sixty square rods, or four roods, or ten chains—all of which anomalous and arbitrary denominations are intended for the measurement of land. And, finally, we have the square mile, containing six hundred and forty acres, which is used in stating the areas of townships and larger territories. The ratios which connect these several denominations are the following. It is sufficient to present them. They need no comment.

$$144 \quad 9 \quad 30\frac{1}{2} \left\{ \begin{array}{l} 40 \\ 16 \end{array} \right\} 4 \quad 2\frac{1}{2} \left\{ \begin{array}{l} 40 \\ 16 \end{array} \right\} 4 \quad 640$$

For measures of solidity we have the cubes of the inch, foot, yard and rod, with the following relations:

$$1728 \quad 27 \quad 166\frac{2}{3}$$

with a special provision for the case of fire-wood, of which the unit is a cord, consisting of one hundred and twenty-eight cubic feet.

The ordinary measures of capacity in the United States are not connected with the measures of solidity by any simple relation. There are

two of these measures—one for liquid and the other for dry capacity. Their origin, history, and the reason of their differences have been very learnedly made out by Mr. *John Quincy Adams*, in his well known report of 1821, on weights and measures, made in the House of Representatives of the United States; but these matters, however interesting, are hardly enough so to compensate for the anomalous condition of things to which they have led. According to Mr. *Adams*, the liquid or wine gallon was designed to contain exactly eight pounds of the wine of Gascony, such as is now known by the names of Claret and Bordeaux—these pounds being pounds of fifteen of the ounces whereof the tower pound of the reign of Henry III. contained twelve—such tower pound being the equivalent in weight of two hundred and forty of the silver pennies of the same king.

The dry measure, or wheat gallon, was designed to contain the same number of similarly determined pounds of wheat. Mr. *Adams* informs us, further, that the specific gravity of the wine named was taken at 0.9935, (temperature not stated,) and its weight per cubic inch at two hundred and fifty grains; and that the ratio of the specific gravities of wheat and wine was as 143 to 175. The pennyweight was held to be equivalent to twenty-two and a half grains. From all which, we calculate that the liquid gallon contained two hundred and sixteen cubic inches, and the wheat or dry gallon 264.34 cubic inches; or the bushel of eight gallons, 2114.68 cubic inches, which is considerably below the value of the Winchester bushel of Henry VII. (2146 cubic inches); or the Winchester bushel as prescribed by the later act of William III., now the bushel of the United States, (2150.42 cubic inches;) or the imperial bushel, established in Great Britain in 1824, (2218.19 cubic inches.) Mr. *Adams* has shown, by a patient and laborious study of the confused and contradictory legislation of successive centuries, how the wine gallon of Henry III. became successively equal to 217.6 cubic inches, 219.43 cubic inches, 224 cubic inches, and finally, as at present, 231 cubic inches; while the bushel, by dry measure, became at length the Winchester bushel of 2150.42 cubic inches—losing thus, altogether, the previously existing proportionality of 175 to 143, which would have required a bushel of not less than 2261.54 cubic inches.

It appears to be a favorite idea of Mr. *Adams*, that there *ought* to be two different units of capacity, bearing to each other the same relation as to volume which the average specific gravity of liquids sold by measure bears to that of corn and other seeds sold also by measure; so that dissimilar volumes of these different articles having the same name, may have also the same weight. This he calls a *uniformity of proportion*, in contradistinction to the relation of equality, which he calls a *uniformity of identity*. But it is evident without argument, that this uniformity of proportion can not be by any means a *uniformity of exactness* except upon the condition that there shall be as many units of capacity as there are varying specific gravities to be dealt with. Mr. *Adams* makes it a reproach to the government of France, that, while professing to create everywhere a uniformity of identity, it still prescribed, by an ordinance



approved on the 6th of December, 1808, by the Minister of the Interior, "that the sale of oil in Paris, by retail, shall be *by weight, in measures* containing five hectogrammes, one double hectogramme, one hectogramme, &c. And," he continues, "these measures, being cylinders of tin, are stamped with initial letters, indicating that one is for sweet oil, and the other for lamp oil. So that here are two measures, of capacity altogether incongruous to the new system, each differing in cubic dimensions from the other, though to measure the single article of oil, and both differing from the litre. They attach themselves in and to the new system by *weight*, but abandon entirely its pretensions to unity of measure, and fall at once into the old principle of adapting the measure to the weight."

If the French government had here been proposing to sell by measure, and not by weight, the reproach would be just. But what shall we say of a system which, though avowedly founded on the principle of "identity of proportion"—of a system, that is to say, which declares that its measures, identical in name but not in volume, are identical also in weight—does yet *not* provide two measures of capacity—one for sweet oil, and the other for lamp oil?

Our measures of capacity could not be more unhappily adjusted than they are. Their single merit is that, bad as they are, they are fixed and definite, and that, by long use, we have made them familiar.

Our system of weights is connected with our measures of capacity and solidity, by the very inconvenient relation that a cubic inch of distilled water, at the temperature of 62° Fahrenheit, the barometer being at 30 inches of mercury, weighs 252.458 grains, which, at 437.5 grains to the ounce, avoirdupois, is equivalent to 997.137 ounces to the cubic foot.\*

The pound, avoirdupois, of 7,000 grains is the unit weight of commerce; but there is another pound, called the Troy pound, of 5,760 grains, which is used for the precious metals, and also, but with a different name and mode of subdivision, for drugs and medicines. The commercial pound is subdivided into sixteen ounces, the ounce into sixteen drams. Its multiples are the quarter = 25 or 28 pounds; the hundred-weight = 100 or 112 pounds; and the ton = 2,000 or 2,240 pounds.

The Troy pound is divided into twelve ounces; the ounce into twenty pennyweights; and the pennyweight into twenty-four grains.

The apothecaries' pound is divided into twelve ounces; the ounce into eight drachms; the drachm into three scruples; and the scruple into twenty grains.

Of these divisions, the avoirdupois is the best, although there is nothing to be said in defense of what is called the long hundred-weight of 112 pounds, or the long ton of 2,240 pounds; and these denominations are gradually going into disuse. The pound is a convenient unit, nearly

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\* It is commonly said that a cubit foot of water weighs 1,000 ounces, or 62.5 pounds avoirdupois; and this is sufficiently near the truth for rough calculations; but when accuracy is necessary, the inconvenience of the actual relation between weight and capacity increases very greatly the labor of calculations.

equivalent to half a kilogramme. Weights below the pound are usually stated in fractions, as one-half pound, one-quarter pound, &c., where that is practicable; and drams are rarely mentioned. The divisions of the Troy and apothecaries' weights are arbitrary in the extreme. In the mint of the United States, the subdivisions of the Troy pound below the ounce are disused entirely; and in the standards prepared at the Bureau of Weights and Measures at Washington, for delivery to the governments of the states of the Union, the ounce is subdivided decimally to the ten-thousandth part; no pennyweight or grain weights being furnished.

Of weights, as of measures, it is claimed that there are important advantages secured by forming denominations lower than the unit on the principle of binary or duodecimal subdivision. But these advantages, if they exist, belong, it is obvious, only to retail dealings. For large or for numerous transactions, subdivisions of the unit in any ratios other than the decimal, occasion only inconvenience, by increasing the labor of computation. The question whether, in small dealings, which are, in general affairs, of purchase and sale, one law of subdivision is better than another, depends quite as much upon the accordance or discordance of this law with that governing the denominations of money, as upon anything else. If a pound of a given article cost twenty-five cents, as many pounds of many articles do, it is much more advantageous to divide this pound into fifths and tenths than into halves and fourths and eighths. It is here that identity of law becomes a "uniformity of proportion," which is truly valuable; and here that the advantage of binary division, of which we hear so much become positive disadvantages.

But the use of the decimal subdivision of weights for purposes of computation, in respect to which its power as a labor-saving contrivance is incalculable, by no means excludes, as it is commonly assumed to exclude, the use of the binary subdivision, whenever it may be found advantageous to employ it, for the practical purposes of life. That the two go along together very well, is evidenced in the example of our own Federal currency, and in the money of the French nation. Though it is law that ten mills shall make a cent, and ten cents shall make a dime, and ten dimes shall make a dollar, we find ourselves under no moral or legal inability to use a quarter or a half dollar, if we please. There are, among those who argue against the decimal system of weights, some persons who apparently hold that the people who shall adopt such a system will be thereby and thenceforth debarred from the right to divide anything by two, or by four, or by eight, or by any other number but ten, forever more. Undoubtedly this is all nonsense. When there is any practical advantage to be gained by the use of binary subdivision in small transactions, such subdivision will undoubtedly be employed, even by those who adopt the metric weights; and this without interfering with the decimal division, but by simply for such cases superadding the other to it. It is within the memory of many now living, that we had once not only the half dollar and the quarter dollar, but the eighth and the sixteenth of a dollar also, visibly represented in legal tender coins. Our current silver coinage was then chiefly provided for us by the Spanish mint. We have chosen to

drive out the lesser fractional coins formed by binary subdivision, and to perpetuate the greater by coining them ourselves ; but the fact that all of them existed for forty years or more after the creation of the Federal currency, and that some of them still exist without disturbing the system, shows that the binary and decimal divisions can go along together, and be carried very far, side by side, without serious inconvenience, when there is any important object to be gained by maintaining both. It is true that the eighth and the sixteenth of a dollar give us fractions of our smallest coin, the cent. But we might have coined half cents and quarter cents, as for a time we did the former ; and the quarter cent would not have been as small as the French centime. The truth is, that these small Spanish coins were driven out, because the dime and the half dime, which are conformed to the decimal division, approach them so nearly in value as to make them useless. Otherwise, like the half dollar and quarter dollar, they might have been retained without, nevertheless, preventing the statement of all values and the performance of all computations from being made in denominations of Federal money.

It is not forgotten that the small Spanish coins here spoken of, bore definite relations to some of the several "currencies" prevailing in the American States before the Revolution, and perpetuated, for a greater or less length of time, in some of them after that epoch. Thus, the eighth of a dollar was "nine pence" in New England, and a "shilling" in New York. The simplicity of some of these relations, especially of that last mentioned, had a tendency to protect the use of the old colonial money of account ; but everywhere, except in New York and North Carolina, and to a great extent in those States also, Federal money has been habitually employed in book-reckoning long before the circulation of the small and worn-out coins of Spain had been finally prohibited.\*

\* A striking illustration of the extent to which the judgments of even the most intelligent men may be biased by education and habit, is furnished in the following passage, extracted from the able report of Mr. Adams, which has been repeatedly referred to in the text foregoing :

"The divisions of the Spanish dollar, as a coin, are not only into tenths, but into halves, quarters, fifths, eighths, sixteenths and twentieths. We have the halves, quarters and twentieths, and might have the fifths ; but the eighth makes the fraction of the cent, and the sixteenth even a fraction of a mill. These eighths and sixteenths form a very considerable proportion of our metallic currency ; and although the eighth, dividing the cent only into halves, adapts itself without inconvenience to the system, the fraction of the sixteenth is not so tractable ; and in its circulation, as small change, it passes for six cents, though its value is six cents and a quarter, and there is a loss by its circulation of four per cent. between the buyer and seller. *For all the transactions of retail trade, the eighth and the sixteenth of a dollar are among the most useful of our coins ; and although we have never coined them ourselves, we should have felt the want of them if they had not been supplied to us from the coinage of Spain.*"

And yet, since this paragraph was written, a whole generation has grown up who know nothing about the eighth and sixteenth of a dollar as coins, and who are so far from "feeling a want of them," that they would feel their re-introduction, if it were attempted, to be a positive nuisance.

It thus appears, from an examination in all its details of the system of weights and measures actually in use in Great Britain and the United States, that this system is one which can only be defended on a single ground—the ground that it actually exists. Were it not that it occupies this position of advantage,—were the question, in other words, now for the first time presented to the statesmen of these two great and enlightened nations,—what system of weights and measures, in the absence of any already established, *ought* to be adopted, it may be safely said that the existing system would have no chance whatever of acceptance, either as it respects its basis, or bases, or as it respects the details of its denominational relations. To supplant an established system is, however, a measure of such gravity, that it should never, and will never, be lightly attempted. It would not be worth while to recommend to the American or to the British people to adopt a new unit of length, for instance, for an object less important than that of bringing into harmony all the discordant systems at present prevailing throughout the civilized world. But it would be worth while to recommend to them, without reference to any such grand and far-reaching design, to effect those important improvements within their own system itself, which, without changing its fundamental units, might be attained, by substituting for the present anomalous multiples and subdivisions of the units, others determined on some principle truly scientific, and preferably to all others, the decimal.

But the prospect of being able to unite all civilized nations in the adoption of one common system of weights and measures and coins, is one of sufficient importance to justify a change much more sweeping than this. And for the achievement of a result so grand and so desirable, nothing more is necessary at the present time than the acceptance, by English speaking nations, and by the Empire of Russia, of the metric system, introduced into France near the close of the last century, and since adopted by the populations of, half of Europe, of a large part of South America, and of Mexico.

The European States\* which have adopted the system are France, Holland, Belgium, Spain, Portugal, Italy, Greece, and the North German Confederation. This last important adhesion to the system took place by a law of the Reichstag, promulgated by King William, of Prussia, in the name of the Confederation, on the 17th of August, 1868, which law is to take full effect on the first day of January, 1872. Since the date of this promulgation, the Confederation has given way to the Empire; so that it can hardly be doubted that, when the date specified in the law shall have arrived, Southern Germany as well as Northern will come under its operation. Out of a total population in Europe of, approximately, two hundred and sixty millions, about one hundred and thirty-five millions have accepted the metric system; and, after the first day of January next ensuing, this will be the only system of weights and measures allowed

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\* *Report of Professor De Jacobi to the International Conference on Weights and Measures of Paris, 1867; Feigné, Conversion des Mesures, Monnaies et Poids, Paris, 1867.*

among them by law. Certain other States have adopted some features of the metric system, especially the law of decimal multiplication and division. This is true of Switzerland,\* which has assumed, for the unit of length, thirty centimetres, and for the unit of weight, five hundred grammes (half the French kilogramme.) Besides the decimal multiples and submultiples of weight, Switzerland continues to allow the use of the old divisions still.

Sweden† has adopted the decimal scale, without adopting metrical units of length or of weight. Her unit of length is the foot = M. 0.297, (the English foot being M. 0.3045,) and her unit of weight = K. 0.42 (the English pound being = K. 0.4536).

Denmark,‡ like Switzerland, has taken the half kilogramme for the unit of weight, and also the decimal scale. But for her unit of length she adheres to the foot, which with her has the value of M. 0.3139.

Austria,§ since 1853, has employed in her custom-houses a pound equal to half a kilogramme, with decimal subdivisions.

Before the decisive action of the North German Parliament, mentioned above, several of the German States had taken some steps toward the introduction of the metric system. This was true in Prussia, in the Grand Duchy of Baden, in Hesse, in Wurtemberg, and in Bavaria; all of which had adopted the decimal scale, and also units of length and weight having simple and definite relations to those of France.

In Great Britain, since 1864, and in the United States, since 1866, the use of the weights and measures of the metric system has been made legal but not compulsory. The law of the Congress of the United States of 1866, provided that standards of weight and measure, conformed to the metric system, should be prepared at the Bureau of Weights and Measures in Washington, and furnished to the executive authorities of all the States of the Union; also, that metric weights and balances should be employed in all the post-offices, for weighing letters, and that the letter weight corresponding to a single postage rate should be fifteen grammes, instead of half an ounce, as had been before provided.¶

\* *De Jacobi's Report, above cited.* † *Idem.*

‡ *Idem.* § *Idem.*

¶ The provisions of this act which relate to letter weight were, by an unexampled blunder in legislation, or a singularly perverse ingenuity in the interpretation of law, rendered almost immediately nugatory. Another act was at the same time pending before Congress, of which the design was to regulate international postage; and as the previous legislation of the United States had made half an ounce avoirdupois the limiting weight for a single postage rate, this act provided, or designed to provide, that in the adjustment of rates with foreign nations, "half an ounce avoirdupois should be held, and taken, for postal purposes, to be the equivalent of fifteen grammes of metric weight." It was intended that this act should be pressed to its passage before the other; but, by some mismanagement, the order became inverted, and it was not passed until the following day. The post-office department of the United States has therefore felt authorized to apply the provision just cited to the interpretation of the act of the preceding day. Congress is thus made to stultify itself by enacting, first, that the limiting letter weight for a sin-

In South America, the metric system has been adopted by Brazil,\* (to take full effect in 1873,) in the Argentine Republic,† in Uruguay,‡ in Chili,§ and in New Granada;|| and in Mexico, in North America.

It thus appears that the metric system of weights and measures is the system established by law for about one hundred and sixty millions of the inhabitants of the civilized world; among all of whom this system is the only one tolerated. It appears further, that this system is made legal, though not compulsory, among about seventy millions more, (the people of the United States and of the British Islands;) or, if the dependencies of Great Britain in all parts of the world be included, among nearly two hundred and fifty millions more. The system, moreover, has been gradually gaining favor everywhere: and of all the great powers which make up the Christian world, there is but one, viz., Russia, which has not, in some form or other, manifested approval of its principles. There is reason, moreover, to believe that this great power will not continue long to maintain so exceptional an attitude. In no country of Europe are the enlightened devotees of science more actively alive to the importance of this great practical reform than in Russia, nor is there any in which such men are more ardently zealous in their advocacy of the measure, or more hopeful in their anticipations of its early success. There are statesmen too, in that great empire, who are fully capable of appreciating all the magnitude of the benefits which must flow from the adoption of a measure so pregnant with good, as well as all the difficulties which must attend its execution, and the embarrassments which must accompany the period of transition; and to their wisdom and their sagacity we may look with confidence for a satisfactory, though it may be a deliberate, solution of the weighty problem which the change, now, as is manifest ultimately inevitable, presents.

To this view of the present state of the question, considered as a political or a practical question, it may be added that the suffrage of the great body of men of science, everywhere, has long since been given in favor of the metric system of weights and measures. Representative bodies of this class of men, of the highest character, and in countries where the system has as yet not come into use, have given public and emphatic expression to their favorable judgment of its merits. The National Academy of Sciences of the United States, the American Association for the Advancement of Science, the British Association for the Advancement of Science, the Royal Society of London, the Imperial Academy of Sciences of St. Petersburg, and many others of those organized bodies which are recognized as constituting the highest scientific authorities of the coun-

gle postage rate shall no longer be half an ounce, but fifteen grammes; and secondly, that fifteen grammes, metric weight, shall be only half an ounce avoirdupois; in other words, that the postal laws shall be changed in an important particular, with the proviso that they shall not be changed at all.

\* *Jacobi.*

† *Idem.* Metric system in use in

§ *Jacobi.*

† *Peigné, above cited.*

Uruguay, but not exclusively.

|| *Idem.*

tries to which they respectively belong, are among those which have thus declared themselves. No account is here taken of the similar associations of France, Belgium, Germany, the Netherlands, and Italy, countries by which the system has been already adopted, since they may be counted in, of course.

By many of these associations (or by all of them) it is recommended or required that, in the scientific papers presented by their members, or printed in their transactions, weights and measures shall be stated in terms of the metric system; and with individual writers for the scientific journals of Great Britain, Austria, Switzerland, Russia, Sweden, Denmark, and the United States, (countries, all of them, in which the metric system does not prevail,) it is becoming every day a more general usage to employ no other. In this respect, the scientific world is so rapidly coming into common accord, that, without any reference to the movements of political authorities, which are often timid, and which, in a matter of this magnitude, may very properly be slow, it will very shortly have created for itself a system of weights and measures which shall be practically universal.

From this view of the actual situation at this time, as it respects the great question of the unification of weights and measures, two inferences present themselves as plainly warranted by the facts. In the first place, to effect this unification, a thing on every account so earnestly to be desired, upon any other basis but the metric system, is palpably a moral impossibility. To expect a people, after having subjected themselves to all the embarrassments attendant on the overthrow of a system interwoven with all their habits of thought, and the substitution in its place of another having not a single point of contact with that which it superseded, intensified, moreover, as these embarrassments were in the case of the French, by the mad precipitation with which the change was thrust upon them, in the wildest period of their eventful history; to expect *any* people, after such an experience, deliberately to relinquish the happy fruits of all this suffering, to reject the new system after it has been familiarized, and though it has been found to be perfect in its scientific method, simple to the last limit of attainable simplicity, and in the highest degree convenient in its practical applications, in order to set up something still newer, but which no logic can ever persuade them is half so good—this is an expectation which no man who has the slightest acquaintance with human nature can ever entertain. Or to expect any other people who may, some three or five or fifteen years ago, have entered voluntarily and though conviction, upon a course of self-education to the details of this system, with a view to its ultimate adoption, under such wise provisions against abrupt and sudden change as might secure them against the confusion which attended its introduction into France—to expect any such people to forego their convictions, and to eschew their legislation deliberately matured, by holding out the temptation of something better than the metric system, after they have satisfied themselves by the study of years that nothing better can be devised—this too is an expectation just as extravagant and just as sure to be disappointed as the

other. If the nations of the earth shall, therefore, ever unite upon a common system of weights and measures, that common system will be the metric system. Conversely, if the metric system shall not meet with universal acceptance, no common system will ever exist.

The second of the inferences referred to above, as deducible from the present aspect of the question under consideration before the world, is that nothing is wanting but persistent effort and active agitation of the measure, to induce those nations whose concurrence in the adoption of the metric system is still necessary in order to make it universal, to follow the example of those by which the system has been adopted already. The progress which has been thus far made toward the end so greatly to be desired, has been made in the absence of any concerted or organized action for the purpose of operating upon public opinion, and has been a simple consequence of the manifest merits of the system itself. Yet this progress has been such as to give us scarcely less cause to wonder than to rejoice; for it is surely a cause for wonder that a change affecting all the material interests of men, and touching all their daily and hourly actions, thoughts and habits, confined at first to a single people fewer than forty millions in number, and forced upon them with so little attempt at preparation, and such utter contempt for the power of habit and the laws of the human mind as to provoke and insure among the less-enlightened a resistance and a struggle protracted through nearly half a century, it is indeed wonderful that such a change should subsequently be progressively and spontaneously courted by other peoples, upon whom no such political pressure has brought to bear; \* until, a quarter of a century later, it is found to extend to half the inhabitants of the civilized and Christian world, and to have secured a legal standing, although not yet an exclusive adoption, among the larger proportion of the remaining half. In this result, so steadily, so silently, and yet, if we count the time upon the great dial of history, so rapidly accomplished, there is something more than encouraging; there is something prophetic and assuring. In another sense than that intended by *Solomon*, we may say, "the thing which hath been, it is the thing which shall be, and that which hath been done, is that which shall be done," till, in respect to measures and weights, there shall be no diversity of things under the sun.

But the coming of this era of happy accord among nations, foreshadow-

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\* The fact that the French attempted to force their system upon the peoples subjugated by them during the wars of the first empire, hardly makes it necessary to qualify this remark; for everywhere except in the Netherlands, with the downfall of the empire, the system was thrown off. The natural effect, moreover, of this attempt, at the hands of a hostile and hated power, would be to produce a prejudice against the system: so that we might expect to find these peoples embittered against it upon grounds purely political. This consideration renders the subsequent prevalence of the system among the same peoples the more remarkable, and shows this prevalence to have been a consequence of the triumph of intelligence over passion no less than over habit.



ing, as in a measure it certainly does, the ultimate acceptance of the higher doctrine of the universal solidarity of peoples, may be greatly accelerated by the union of all the influences which can be brought to bear upon the minds of men, through the consentaneous and organized action of all the friends of progress throughout the world. This consideration justifies here a brief enumeration of those characteristics of the metric system itself, which fairly entitle it to the general preference which it has already secured, and to the universal acceptance to which it is manifestly destined; and the same reason demands that the various objections which have been urged against the system, sometimes by men of note and high ability, like Mr. *Adams* and Sir *John Herschel*, should be candidly examined.

The metric system, supposing it to be universally received, will of course be productive of all the benefits which must belong to any common system of weights and measures as a consequence of the fact that it is *common*; and these may, therefore, be at once claimed for it, and will be conceded without argument. It is worth while first to glance at these.

The advantages of a common system, simply as such, are felt in regard to all matters in which nations have a common interest, such as the affairs of commerce, of the adjustment and collection of customs-imposts, and of the interchange of thought under every form, as personal, postal, telegraphic or diplomatic.

In commercial transactions carried on between peoples whose standards of weight and measure differ, and whose monetary systems are usually different at the same time, every exchange effected involves a laborious transformation of the expressions of value from one system to the other. When transactions are large, the burden thus imposed is enormous, and is felt not merely in the labor it imposes, but also in the considerable loss of time which it involves. The unnecessarily increased labor implies, moreover, of course, a correspondent unnecessarily increased expense. It is found, in fact, to be indispensable in every commercial house largely engaged in foreign commerce, to employ computers to conduct this class of calculations, who have been specially trained to the work, and who are charged with no other duty. But every expense incurred in the process of transferring commodities of whatever description from the producer to the consumer, enters at last into the selling-price of the commodity: so that the diversity of weights and measures existing in the world compels the consumers of imported articles in every country to maintain an immense staff of calculators to perform labors for which, in the nature of things, there is no necessity whatever; whose salaries are nevertheless paid out of an assessment *pro rata* upon every article consumed. Moreover, the time which is occupied in performing these calculations retards to a certain extent the completion of every transaction, and is to the same extent a tax upon profits, by keeping capital inactive.

**A common system of weights and measures is furthermore promotive**

of honest dealing. The public who consume the productions of foreign lands have, in the absence of such a common system, not only in general no actual knowledge of the relative value of commodities at home and abroad, but hardly even a possibility of knowing. And in the fluctuations of value which are continually occurring in foreign markets, none but experts can correctly judge what ought to be the legitimate effects of such changes upon current prices at home. With a common system of weights, measures and moneys, the opportunities of securing extravagant profits by false representations, or of maintaining prices above their just level, when in the natural course of things they should decline, are greatly reduced ; and this effect will be so much the more decisive and positive, in proportion as this common system is more simple in its form, and more scientifically methodical in its principles. This, therefore, is one of the points in which the metric system, should it become the system universally prevalent, will be found to be especially valuable. It will not only make it possible, but will even make it easy, for all mankind to understand the ways of the market ; and will render those artifices of trade by their ignorance of which they are now such frequent, and are liable to be such continual, sufferers, in a great degree ineffectual.

The advantage of a common system of weights and measures is especially great in all matters relating to the assessment and collection of that part of the revenue of nations which is derived from imposts upon their foreign commerce. Here the existence of such a common system permits the use of the original invoices, without any alteration of the figures in which quantities are expressed, for the purpose of fixing the amount of the duties to be levied. There is no room for error or mistake in the declarations of importers, nor any danger of those misapprehensions, in consequence of which delays so often occur in the deliveries of merchandise, and seizures are occasionally made without cause. But in the absence of such a common system, all those transformations are necessary which have been already mentioned as encumbering commerce ; so that, practically, this heavy labor of arithmetical computation has to be performed twice over. The government must have its computers, that it may protect the public interest, and the importer must have his also, that he may know that he suffers no injustice. Many employees are thus kept continually occupied in the performance of labors which add nothing to human wealth or human comfort, but which are made necessary by differences growing out of the early isolation or limited intercourse with each other, of different races or communities of men. With the disappearance of these differences would disappear at the same time the necessity of this profitless labor ; and thus there would be liberated for more useful service in other directions, a vast amount of ability and energy now wasted.

As it respects intercommunication or exchange of thought between individuals belonging to different nationalities, the value of a common system of weights and measures is of the highest practical importance. Without such a system there may be no understanding of even the most com-

mon statements in regard to the affairs of life, unless through a resort to tables or to calculations which render intercourse wearisome, and protract intolerably the simplest explanations. And as in oral communications there is rarely disposition or opportunity carefully to verify results, the liability to misunderstanding is under these circumstances exceedingly great. This may be illustrated by the experience of any one who has had occasion to travel successively through countries differing widely in their monetary systems, but not all in this respect equally differing from his own. An American in France will feel himself, from the first day, as little liable to be deceived in regard to the values of sums expressed in francs and centimes, as he would be if they were stated in dollars and cents. But it is quite otherwise when he passes into Germany, and hears nothing spoken of in the way of money but thalers, silbergroschen and pfennigs.

As it respects diplomatic intercourse also, the absence of a common system of weights and measures is a serious disadvantage. It makes necessary in many cases a duplication of statements in the same documents, so that quantities or dimensions may be expressed in denominations familiar to both the nations represented, and requires, of course, on both sides, the verification of the equivalency of these double forms.

In the matter of intercommunication by postal conveyance or by telegraph, there enter certain other considerations of inconvenience, which arise from the want of common standards of weight, measure and money. The tariff of postages is founded generally upon weights, but sometimes also upon both weights and distances; and the postage rates are payable in the denominations of money current where the letters are posted or where they are delivered. Hence arise difficulties in the adjustment of the tariffs themselves, and occasional embarrassments and possible errors in assessments made under them. The limit of weight allowed for a single postage rate, as expressed in the denominations in use in two different countries, cannot be made to conform to that fractional amount which would be necessary on the one side or on the other, or on both, to secure perfect identity, since the weights on both sides must be units or simple fractions of units familiar to the people. There will, therefore, be sometimes letters which are within the limit at the station at which they are posted, but which will be beyond the limit at that at which they are received. Again, the writer of a letter may be aware he has not exceeded the legal limit as it will be understood at the place where his correspondent is residing; and yet he may find it taxed with a double rate at the office where he is obliged to post it. From the want of harmony in these particulars, correspondence is sometimes subjected to delays, and sometimes actually suppressed as underpaid. Occasionally a functionary will consult the schedule of weights allowed by the postal regulations of the country for which the letter is destined, and if the frank accords with this, will allow it to pass, though overweighted according to his own. If such is his practice, he may have to refer from time to time to several systems of weight and measure besides that of his own country. By the

adoption of an international system he would be required to make reference to only one ; which would be so much gained, even though his own, for internal affairs, should not be abandoned.

Telegraphic dispatches are charged in general according to distance. As the lines along which international telegraphs have been erected are few and definite, it is practicable for the companies to prepare and to print tables for the guidance of the operators employed in the several offices established for the receipt and transmission of dispatches. But so long as different standards of distance and money exist in different countries, these must assume as many forms as there are varieties of these standards ; and with the extension of the lines, the trouble of revising and correspondingly extending these various guides will continually recur. With the adoption of common standards, all these embarrassments will disappear.

The advantages of a common system of weights and measures, thus far considered, are such as would result from the universal acquiescence of nations in *any* common system. But if this universal acquiescence should be secured for the metric system, there would be secured at the same time benefits of a very high order, which have their source in the nature of the system itself. Of these, the most prominent are those which relate to the educational, practical, and scientific uses which the standards by which quantities are measured naturally subserve.

The first and most obvious advantage resulting from the system, considered as an educational instrumentality, arises from the fact that it presents but a single form of expression for numerical values of all the descriptions, and brings abstract and concrete numbers under precisely the same rules of operation.

One of the heaviest burdens laid upon the youthful mind, in the study of elementary arithmetic, consists in the complicated rules required for the treatment of what are called "compound numbers." This burden disappears, as if by magic, the moment that, in place of the anomalous subdivisions of weight and measure which have descended to us from barbarous times, we substitute the denominations of the metric system. Where all was blindness and obscurity before, the change introduces light, and the young learner pursues with pleasure a task which he had previously found to be irksome and repulsive.

The experience of all mankind proves that the decimal system of numeration is the simplest of all conceivable systems for the expression of considerable numbers. It is so even among peoples who are scarcely removed sufficiently from barbarism to count an hundred. Such peoples count almost invariably by tens, told off upon their fingers, and told off sometimes upon both their fingers and their toes. Among civilized peoples, children usually learn the value of the ten Arabic numerals before they are taught the artificial systems of numeration by means of which these ten characters are made to suffice for the expression of all numbers. And this system is so simple in itself that it is acquired almost without a sensible effort. Then follow those elementary processes which are com-

monly called the ground rules of arithmetic, the mastery of which is a primary necessity, whatever be the systems of concrete numbers upon which the learner is to be afterwards required to employ his arithmetical powers. But these being acquired, everything is acquired which the metric system demands, while for one who has to deal with quantities expressed in the weights and measures of any other system, his task is not yet begun.

The extension of the decimal method to fractions of the unit requires but a slightly greater effort than that which is involved in the acquisition of the numeration of integers. The similarity of the principle makes it easy. This extension, moreover, is one which the learner is compelled to make, whether he is taught the metric system or not; and the fact that in the visible divisions of metric weights and measures he has palpable illustrations presented to him of such an extension, makes of this system actually a species of educational machinery for facilitating the attainment of correct conceptions of the abstractions of arithmetic.

While it is an advantage of great importance and value, that, by the aid of the metric system, the elementary books used in schools may be cleared of a vast amount of rubbish, and both teachers and learners relieved of a task as profitless and unnecessary as it is dreary and painful, it is by no means a small one that there will be effected simultaneously a very material saving of time not only in the teaching of arithmetic, but also in all those branches of education which have to deal with material things. The simplicity of the metric expressions for quantity so sensibly facilitates the clear understanding and recollection of the facts of physical and chemical science, of political economy, of statistical geography, and other kindred subjects, and so singularly abbreviates all calculations which it is necessary to institute in regard to these things, that the gain to the learner has been estimated by persons of good judgment at not less than a third part of the time ordinarily devoted to education.\* This estimate may be considered excessive, but that the gain is large is too evident to admit of question.

Next to the educational benefits which must follow the adoption of the metric system, may be mentioned the practical. The first of these consists in the extreme facility with which, in the actual affairs of business, all computations may be made by the help of this system for the purposes either of the tradesman or of the mechanic. The advantage hence resulting is three-fold. The mental effort required for the operation is less, the time consumed in making it is less, and the liability to error is materially less than is the case in the use of denominations of weight and measure not standing to each other in decimal relations.

In the mechanic arts, moreover, particularly in all constructions in which the exact adaption of the several parts to each other is essential, the measures of length in use, where the metric system has not yet been adopted, are too deficient in the delicacy of their subdivisions to answer the purposes of the workman; and they have accordingly, as has been remarked earlier in this paper, been discarded in favor of a decimal di-

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\* *De Jacobi's Report, above cited.*

vision. This is a tacit recognition of the merits of the principle on which the metrical relations are founded; and it furnishes an indication of what would be the practical advantages which would follow the adoption of the decimal division throughout all the range of linear dimensions.

As it respects weights, where minute accuracy is required we have seen a tendency in the same direction. The jewellers of England and the United States may still continue to deal in grains and pennyweights, but the mint of the United States has discarded these denominations for decimals of an ounce, and analytic chemists everywhere use grammes and millogrammes only.

But one of the most important of the practical advantages which the metric system offers to those who use it, is found in the relation which connects *weight* with the measure of *cubic capacity*. The unit measure of capacity is a cubic decimetre, and is called a litre. The litre of water furnishes the unit of commercial weight, which is a kilogramme. The litre contains one thousand cubic centimetres. A cubic centimetre of water, therefore, weighs one gramme.

Water again is the standard of reference for specific gravity; that is to say, its specific gravity is 1. Hence, as the bulk of water in litres is the weight of the same water in kilogrammes; or as the bulk of water in cubic centimetres is the weight of the same water in grammes; so the bulk of any other substance in litres (cubic decimetres) multiplied by the specific gravity of that substance, is the weight of the same substance in kilogrammes; and the bulk of any other substance in cubic centimetres similarly multiplied, is the weight of that substance in grammes. Silver, for instance, has a specific gravity of  $10\frac{1}{2}$ . Hence  $10\frac{1}{2}$  kilogrammes of silver would form a solid having the contents of one cubic decimetre. And one cubic centimetre of silver weighs just ten and a half grammes. On this principle, the weights of all solids are deduced in metric values with great facility, from a knowledge of their bulks and specific gravities; and the bulks are in like manner and with equal facility deduced from their weights. But these are problems which are only solved by means of many figures, involving several successive multiplications and divisions, usually also with inconvenient numbers, when any other modes of stating weights and dimensions are employed except those furnished by the metric system.

The advantages which accrue to science from the use of this system are equally important. The first of these to be noticed is a natural consequence of the fact that the system is in itself one of the most complete and admirable examples possible of scientific method. Being constructed in exact accordance with the plan of abstract arithmetic, it makes available, for the purposes of its computations, all the tables which have been prepared with reference only to the properties of abstract numbers; thus not only reducing labor, but increasing the power of the machinery by which labor is performed. The connection between bulk and weight also, which has just been mentioned as being attended with such frequent advantage to the practical man, is an advantage still greater to the man of

science; and it is, in itself, an idea strictly scientific, as admirable for its ingenuity as for its scientific simplicity. The artisan or the mechanic may have occasion to avail himself of this property of the system only at considerable intervals, but the chemist or physicist finds it of daily and hourly use.

The metric system has furthermore become almost a necessity to the scientific world, in order that those who belong to this world may understand one another. Much of the literature of science produced in the early part of the present century, and in centuries before the present, is made practically useless to modern readers, in consequence of the fact that all its statements of quantity of every kind are made in denominations which are only locally intelligible. In science, it is hardly necessary to say, exactness is everything; and hence the literature above spoken of fails in precisely the point in which all its possibility of value lies. A patient student might, it is true by, laborious transformations of the expressions given, bring them into a form suitable for comparison with results elsewhere obtained; but it is not always the case that the values of the denominations employed are accurately known. Mr. *Peigné*, in his compendium of the weights, measures, and moneys of the world, published in France in 1867, speaks of the task he had attempted as one which "bristled with difficulties, numerous and at times insolvable, however obstinate and conscientious the persistence which one might bring to it." The making of the supposed transformations is, therefore, not only laborious, but it is not always attended with such certainty as to the corrections of the results as is necessary to the validity of scientific deductions.

In the later years of our century the practice has become so general with scientific writers, of stating measures and weights in terms of the metric system, that a scientific literature is growing up which is truly cosmopolitan. Simultaneously also an extension has been given to the scope of the inquiries in social and statistical science, so wide as to render the use of the system for these purposes a matter not of mere choice, but of necessity. It is now nearly twenty years \* since there was assembled at Brussels, on the invitation of the Government of Belgium, a convention which assumed the name of "The First International Statistical Congress." This body consisted of two hundred and thirty-six members, who were about equally divided between Belgium and foreign countries, thirty-five being delegates appointed by governments. This first convention, held in 1853, has been followed by six others, of which the second was assembled in Paris, in 1855; the third at Vienna, in 1857; the fourth

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\* This paragraph, and those following, which relate to "The International Statistical Congress," and the probable influence of the proceedings of that body upon the progress of metrological reform, are borrowed from a paper read before the Convocation of "The University of the State of New York," at a session held at Albany on the first day of August, 1871, and published in the "*Albany Argus*," of the sixteenth of the same month.

at London, in 1860 ; the fifth at Berlin, in 1863 ; the sixth at Florence, in 1867 ; and the seventh at the Hague, in 1869. The spirit in which these great international assemblages originated is explained in the following brief extract from the report of Mr. *S. B. Ruggles*, of New York, the delegate from the United States \* to the convention of 1869, at the Hague, recently published by order of the United States Senate.

"The distinguished promoters," says Mr. *Ruggles*, "of the first Congress, at Brussels had seen enough of modern statesmanship to know that the government of nations, in their present state of material progress, cannot be wisely conducted without a thorough knowledge of 'quantities ;' and that the systematic collection and philosophical arrangement of the 'quantities' needed for showing the general condition of nations, was an indispensable preliminary to any recommendation by an international congress of any measures seeking to promote the general welfare."

In accordance with this spirit, "the official report (or '*Comte rendu*'), of the congress at Brussels shows its labors to have been largely devoted to the scientific analysis of 'quantities,' in subjects interesting to all nations, to be used as the basis of a uniform system of inquiries, in actually collecting the necessary facts." And in like manner all the succeeding congresses have devoted themselves sedulously to the labor of bringing together every description of facts obtainable in regard to the actual wealth, the productions, natural and artificial, the condition of industry and commerce, the character of the social institutions, and other matters of kindred interest, relating to the various peoples who make up the population of the globe. The results of such inquiries could only be made available for any useful purpose, on the condition that all the "quantities" so ascertained should be reduced to a form in which they could be compared ; on the condition, therefore, that they should be expressed in denominations of the same system of weights and measures ; and, accordingly, it has been urgently recommended by all these congresses, that all statistical statements everywhere should be made in terms of the metric system. The seventh and most recent of these assemblies, moreover, inaugurated a work which, if efficiently prosecuted, will be in honorable harmony with the magnificence of the idea which originated these congresses of the nations. The nature of this work is thus stated by Mr. *Ruggles* :

"On the last day of the session, Dr. *Engel*, the distinguished director of the statistical bureau of Prussia, presented to the body, in general assembly, a plan of great comprehensiveness and importance, which had been matured after full discussion in the appropriate section, and conversation with most of the governmental delegates. It provides for a full and systematic exploration of the whole field of international statistical inquiry, which is divided for that purpose under twenty-four different heads, each to be the subject of separate investigation by the delegates

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\* Mr. *Ruggles* also ably represented the United States in the fifth Congress, at Berlin.



or members from some one of the nations to be selected, and which is to embrace the statistics under that head of all the nations. This great work, if fully carried out, will furnish, in convenient encyclopedistic form, a systematic series of carefully prepared reports on most of the subjects of highest interest to the statesmen and legislators of the different nations. Editions of at least two thousand copies of each report are to be published in octavo volumes, under regulations prescribed in the plan, which was unanimously adopted by the congress, with strong expressions of approbation."

Without the metric system, the vast mass of information thus collected will be unavailable; the encyclopedia would be illegible. This system has, therefore, thus become something more than a mere instrumentality in the service of statistical science; it has become even an integral part of the science itself. Henceforth the two are so irrevocably wedded that they can not be separated.

The "International Statistical Congress" may now be regarded as an established institution. Its eighth meeting in order of succession will be held some time during the course of the year 1871, and probably in St. Petersburg. Already the influence of its deliberations, of the published results of its labors, and of the spirit of comprehensive statesmanship which it has inculcated and fostered, is beginning to be sensibly felt, and with each successive decade of years it will be felt with a power continually increasing, in educating the minds of the peoples and in moulding the counsels of governments into harmony with the great principle that nations only then consult their truest interests when they consult the common interests of humanity.

The germ idea of an agency which, with time, has developed itself into a power capable of controlling, and destined so largely to control, the future of human history, is to be found in the report of Mr. *Adams* to the House of Representatives of the United States Congress, made in 1821, which has been already cited in this note. Though this report discouraged the adoption of the metric system by Congress, and though its reasonings had the effect undoubtedly to impress the popular mind with the conviction that the introduction of the system into the American States is hopeless, yet the author himself was as deeply imbued with admiration of this system, considered as a scientific creation, as the warmest of its advocates; and no one felt more profoundly than he how great would be the boon to humanity if one uniform system of weights, measures, and moneys could be made to prevail everywhere throughout the world. In the view of his large and statesmanlike intellect, very many of the embarrassments which attend intercourse between nations, spring from the narrow and selfish legislation which looks only to the immediate interests or convenience of particular communities, and disregards the results to the great family of men. To him all nations and all races are brothers by blood, inheriting the earth as their common patrimony; and though, in the existing state of human society, it is necessary that the artificial lines which divide States from each other should be preserved, it is em-

inently desirable that, for as many purposes as possible, they should be kept out of sight. He therefore proposed that the President of the United States should be authorized to invite the governments of the several States having diplomatic relations with that of the Union, to appoint delegates to a Congress of nations, charged with the duty of deliberating upon measures likely to be promotive of the general welfare; but foremost, and especially, upon the possibility of establishing a uniform system of weights and measures for all mankind. That this important proposition was productive of no immediate result, is attributed by Mr. *Ruggles*, and with apparent justice, to the political condition of Europe during all the earlier portion of this century; and especially to that compact of political rulers for the suppression of liberal thought, and the stifling of all freedom of political discussion, which the momentous events of recent history have since shattered, known as "the Holy Alliance." Happily, however, at length, to use the vigorous words of Mr. *Ruggles*, "we find the germ of the general convention, planted by the far-seeing sagacity of Mr. *Adams* in 1821, though slumbering for a generation beneath the surface, actually fructifying in 1853, when the first general assemblage of nations by government delegates, and really international in its objects, was convened at Brussels."

From this epoch dates a new era in the history of the world's legislation. From the enlarged views of the reciprocal duties as well as of the true interests of nations in which this great general movement originated, are destined, through its instrumentality, to impress themselves more and more completely upon human institutions; until statutes shall at length cease to be monuments of ignorance, prejudice, or ignoble jealousies, and the aim of all laws shall be the greatest good of the greatest number. One most important result has already been secured by the action of these congresses, in that, so far as the science of statistics is concerned, so far, we may even say, as the successful conduct of governmental administration is concerned, it has made the metric system of weights and measures a system of universal necessity, and has made a familiar acquaintance with it absolutely indispensable to every statesman, every publicist, every teacher or student of political economy, and every enlightened lawgiver throughout the world.

It only remains to examine briefly some of the objections which have been brought forward in disparagement of this system, and which have been urged as reasons for discouraging its extension into countries which have not yet received it. These may be distinguished into two classes; as first, strictures upon the merits of the system itself; and secondly, grounds for believing its further extension impossible. The expression "further extension," meaning by this, *further extension in any direction*, is essential to this statement; for the alleged difficulties classed under this head exist equally in every quarter in which the metric weights and measures have not yet been accepted.

It has been objected to the system, upon grounds purely theoretic or scientific, that the basis upon which it rests is not well chosen. The

metre is in theory the ten-millionth part of a quadrant of a terrestrial meridian. Its length is, therefore, as unalterable as the dimensions of the earth itself: and it is impossible that, by any accident or complication of accident, it should be permanently lost. Nor is it true, as is commonly said, that in case of the loss of all its visible types, a thing hardly conceivable, resort should be necessary to the remeasurement of the great arc of the meridian passing through France, from which it was originally deduced, for its recovery. For unless all the record of that magnificent survey should be simultaneously stricken out of existence, and all the monuments obliterated which were employed to mark the important points of the great triangulation, the redetermination of any one of the lines connecting those points would suffice for the purpose, since the metrical values of all those lines are now perfectly known.\* The objection, however, is, that all the terrestrial meridians are not equal. The metre, therefore, supposing it to be correctly determined, is only the ten-millionth part of a quadrant of *that* meridian on which the great French arc was measured. This objection is pressed very seriously by Sir *John Herschel*,† who quotes the discussion by General *de Schubert*, in the Memoirs of the Academy of Science of St. Petersburg, of the principal meridian measurements heretofore made, wherein it is concluded that the equator is an ellipse and not a circle, its major axis having one extremity in longitude about  $41^{\circ}$  east of London, the other falling in the middle of the Pacific ocean.‡ The ellipticity apparently made out is very slight,

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\* It would suffice to remeasure the base lines on which the triangulation rested, the termini of these having been fixed by durable monuments.

† A lecture entitled "*The Yard, the Pendulum, and the Metre, considered in reference to the Choice of a Standard of Length.*" Read before the Leeds Astronomical Society, October 27, 1863. By Sir JOHN F. W. HERSCHEL. Published in a volume of "*Familiar Lectures on Scientific Subjects.*" London and New York: 1866.

‡ "*Essai d'une détermination de la véritable figure de la Terre.* Par T. F. DE SCHUBERT." St. Petersburg: 1859. An abstract of the most important particulars of this discussion was prepared by *Madler*, for Prof. *Heiss's* Wochenschrift für Astronomie, Meteorologie und Geographie (Nos. 51 and 52, Dec. 21 and 28, 1859), which was afterwards translated by C. A. Schott, Esq., of the United States Coast Survey, and republished in the *American Journal of Science*, vol. XXX., second series, from July to Nov. 1860.

Mr. *Airy* also, Astronomer Royal of England, gave, in the *Monthly Notices of the Royal Astronomical Society* for January, 1860, a synopsis of the method of Gen. *de Schubert*, and its results, suggesting at the same time that, by generalizing the method still farther, these results might probably be made more satisfactory. Upon this hint of Prof. *Airy*, Capt. *A. R. Clarke*, of the British Ordinance Survey, was led to make a very elaborate re-examination of the question of the earth's figure and dimensions, reaching conclusions somewhat different from those of Gen. *de Schubert*, and increasing the apparent error of the metre.

The publication of Gen. *de Schubert's* paper, here referred to, marks certainly a new era in the history of geodetic investigation; but the data thus far gathered by direct measurement are far from being sufficient to admit of the satisfactory application of his method, or of the more general one of Capt. *Clarke*, in practice. The truth of this assertion will be manifest from the following statement:

(only a little over one-nine-thousandth,) and the actual difference between the major and the minor axis is less than one mile. The difference is sufficient, however, to invalidate the assumption of the scientific commission of 1799, under whose advice the basis of the metric system was

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Hitherto, it has been generally held by geodesists, (1,) that the meridians of the earth are ellipses; (2,) that the axis of rotation is the minor axis of all these elliptical meridians; and (3,) that the meridians of the earth are all equal. On this hypothesis, it would not matter in how widely different longitudes different degrees of latitude should be measured; when compared, they ought always to give the same values for the polar and the equatorial diameters of the spheroid, and for the compression of the poles. The fact is, that the results deduced from such comparisons are largely discordant.

Gen. *de Schubert's* paper commences with a series of comparisons of this nature. For the purposes of the comparison he selects eight different arcs, viz: the great Russian arc, of  $25^{\circ} 20'$  in length; the Indian arc,  $21^{\circ} 21'$ ; the French arc, (extended to Formentera,)  $12^{\circ} 22'$ ; the South African arc, (of Maclear and Henderson,)  $4^{\circ} 37'$ ; the Peruvian arc,  $3^{\circ} 7'$ ; the British arc,  $2^{\circ} 50'$ , (since extended to  $10^{\circ} 13'$ ); the Prussian arc,  $1^{\circ} 30'$ ; and the Pennsylvania arc,  $1^{\circ} 29'$ . Five of these eight arcs differ much less in longitude than could be desired, being all within a range of less than thirty degrees. The Indian and the Peruvian arcs differ in longitude by nearly half a circle, but the Peruvian is very short. The Pennsylvania arc is nearly in the same longitude as the Peruvian, and seems to have been included, not as having important weight, but because of this circumstance.

Comparing each of these eight arcs with every other, the author obtains twenty-eight systems of elements, presenting great discordances. The maximum and minimum values obtained for the semiaxes differ by miles, and the values found for the compression are equally various. Gen. *de Schubert* concludes from this that the earth cannot be a solid of revolution; but he still holds that the meridians are elliptical; and he consequently infers that the true mode of finding the figure of the earth is to compare different portions of each arc with other portions of the same arc, or with the whole.

When this conclusion is reached, however, we see at once how meagre are the materials available for the application of this method. The Russian arc a little exceeds one-fourth of a quadrant in length, and the Indian arc falls short of one-fourth of a quadrant by about the same amount. The French arc (extended to Formentera) is about one-seventh of a quadrant. These are long enough to permit of some comparisons, tolerably trustworthy, to be made within themselves; but the rest in the list above given may for this purpose be dismissed at once.

Now dividing these three principal arcs into two portions approximately equal, each, the author obtains from the Indian and the Russian, values of the polar axis differing only about fifteen hundred feet; but the difference between the values of this element as deduced from the Indian and the French arcs, is more than ten times as great, or exceeds fifteen thousand feet.

The author therefore rejects the French arc in making this determination, thus narrowing his base to the Indian and the Russian alone; giving at the same time, rather arbitrarily, double the weight to the Russian which he gives to the Indian.

By the aid of the semiaxis thus found, and the measured length of the degree of Peru, the equatorial radius in the longitude of the Peruvian arc is obtained; and this, with the Indian and the Russian equatorial radii, serves to determine the eccentricity of the equator, considered as

selected ; the assumption, viz : that the earth is a regular oblate spheroid, all the sections of which, made by planes passing through the axis of revolution, are equal and similar. On this assumption, the ten-millionth part of any one meridional quadrant is the ten-millionth part of any other ; and wherever a man may be upon the surface of the planet, he has beneath his feet the natural standard upon which rests the system of

an ellipse, and the position of its major and minor axes. To find the length of a meridional quadrant in any longitude, the next step is to calculate (which with the data now possessed is easy) the length of the equatorial radius in that longitude. This is the major semiaxis of the meridional ellipse, and the earth's polar semiaxis is the minor.

The idea of this method is excellent, but it rests on assumptions which are only approximately true, and it requires that more numerous and more extended measurements should be made before it can be satisfactorily applied. It assumes that the meridians are all elliptical, but none of them appear to be strictly so. It assumes the equator to be an ellipse, but the equatorial diameters independently deduced from the several meridional arcs do not well sustain that hypothesis. Capt. *Piazzi Smyth*, Astronomer Royal of Scotland, expresses the opinion ("*Our Inheritance in the Great Pyramid*," p. 38,) that they prove it rather to be "an irregular curvilinear triangle." There is, furthermore, a mechanical difficulty involved in Gen. *de Schubert's* theory of the earth's figure ; which is, to explain how a planet of which the surface is three-fourths, and the equatorial circumference nearly five-sixths, fluid, should have the form of an ellipsoid of three unequal axes.

It was suggested by Prof. *Airy*, as above stated, on examining the results of Gen. *de Schubert*, that a better mode of employing the available material would be to make no attempt to determine in advance the value of the earth's polar axis, or any of its equatorial radii, but to leave the three semiaxes of the ellipsoid, as well as the longitude of the equatorial semiaxes, indefinite ; and to determine, by the method of least squares, what values given to these would best represent all the positions of all the stations which had been determined astronomically and geodetically upon the several arcs measured. This was the method employed by Capt. *Clarke*, in his elaborate investigation presented to the Royal Astronomical Society in 1860, and published in that year in the 29th volume of their *Memoirs*. Capt. *Clarke* selects forty stations upon the lines of the Indian, the Russian, the French, the British, and the Peruvian arcs, and determines what are the values of the variable elements mentioned above, which make the squares of the errors of latitude of these stations a minimum. He thus finds a larger eccentricity in the equator than Gen. *de Schubert*, and a smaller polar axis ; also a larger eccentricity of the Paris meridian, and a larger error of the metre. Capt. *Clarke* has several times modified his results, as reason has been found to correct the latitudes of some of his stations ; and he appears to be by no means satisfied that the equator is truly an ellipse and not a circle. On this point his own language is : " Whatever the real figure of the earth may be, if on the investigation we presuppose it to be an ellipsoid, it is quite clear that the arithmetical process must bring it out an ellipsoid of some kind or other ; which ellipsoid will agree better with all the observed latitudes, as a whole, than any spheroid of revolution will. Nevertheless, it would scarcely, I conceive, be correct to say we had *proved* the earth not to be a solid of revolution. To prove this would require data which we are not in possession of at present, which must include several arcs of longitude. In the meantime, it is interesting to ascertain what ellipsoid does actually best represent the existing measurements."

weights and measures for the world. But since this assumption has been shown to be possibly or probably incorrect, we are no longer at liberty to regard the ten-millionth part of a quadrant of a meridian as being a quantity everywhere the same. A metre deduced from the great meridional arc of Russia would be slightly greater than one derived from the arc of Peru. The *actual* metre, supposing it to be truly the ten-millionth part of the French quadrant, would fall very nearly half way between these values; since, according to *de Schubert*, the radius of the equatorial ellipse lying in the plane of the French arc is very nearly the mean equatorial radius; while the similar radii corresponding to the Russian and Peruvian meridians, are not far from the positions of the equatorial semi-axes.\* This discovery, if it is proper to apply such a term to what is as yet but a plausible hypothesis, renders it necessary to qualify the definition of the metre, and to say that this unit is the ten-millionth part, not of a quadrant of *any* terrestrial meridian, but of a quadrant of a particular terrestrial meridian. Whatever there may be, therefore, pleasant to the imagination in the idea of a standard derived directly from a dimension everywhere the same, and everywhere equally ascertainable, of the globe on which we live, must be relinquished. This consideration would no doubt have been fatal, in the view of the scientific commission of 1799, to the claims of the meridian as a basis of a system of weights and measures, had the irregularity of the earth's figure been known at the time it was selected for that purpose; for the commission rejected the proposition to adopt the pendulum as the basis, for the reason of a similar want of uniformity of the indications of such a standard in different latitudes and different longitudes. It must be obvious, however, that it is only the ideal perfection of the standard, scientifically considered, that is impaired by the discovery of the irregularity of the terrestrial ellipsoid. Practically this circumstance is of no importance whatever. If the standard had been some natural dimension to which reference could upon occasion be easily made, either directly by individuals, or by the combined efforts of several, exacting in practice no great labor or expenditure of time or of money, then the discovery that this dimension, originally assumed to be everywhere the same, is not so, would be one of gravity. But the quadrant of the meridian has no such universal availability as this. It was not contemplated by the authors of the metric system that the stupendous labor of measuring a great meridian arc would be ever again undertaken for the purpose of simply verifying the length of the metre, or of recov-

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\* The positions of these axes are, however, very imperfectly ascertained, if indeed the whole hypothesis of the ellipticity of the equator is not a mistaken one. Capt. *Clarke's* paper, referred to previously, removes the vertex of the equatorial ellipse from longitude  $41^{\circ}$  East to longitude  $14^{\circ}$  East. This would give to the Paris meridian nearly a maximum instead of a mean length. In his revised calculation, published in 1866, in an appendix to a volume from the Ordnance Survey, containing "*Comparisons of Standards of Length of England, France, Belgium, Prussia, Russia, India and Australia*," he removes it again from  $14^{\circ}$  East to  $15^{\circ} 34'$  East.

ering it, in case of its accidental loss. The latter accident was provided for, by directing that the metre should be re-established, in case of the destruction of the prototype deposited at the palace of the Archives, by means of its known relation in length to the length of the pendulum vibrating seconds at Paris. But it is not probable that even this comparatively expeditious method would be practically resorted to, since pendulum experiments of this degree of delicacy are difficult; and are themselves subject to some uncertainty. The probability rather is, that the prototype metre would be replaced, if lost, in the same manner in which the standard British yard was reproduced after its destruction by the burning of the Parliament houses in 1834; and that is, by the comparison of copies of it carefully made previously to its destruction, of which considerable numbers now exist. The British statute on the subject, like the French, required the reproduction to be made by reference to the seconds pendulum; but since the renewal of the standard, this provision of law has ceased to exist in Great Britain.

Looking at the matter practically, therefore, it may be stated that the metre is the length of a certain platinum bar, originally constructed of the exact length, as presumed, of one-ten-millionth part of the terrestrial meridional quadrant passing through Paris; this length having been determined by an elaborate measurement of nearly one-ninth part ( $9^{\circ} 40'$ ) of that quadrant. The paramount reason for the selection of such a standard originally, was that the unit might be as invariable as the globe itself. This property of invariability it has, in being derived from a particular meridian quite as completely as it could have it if all the meridians were equal. The fact that the metre represents the ten-millionth of one particular quadrant, is only to be regretted, inasmuch as it detracts from the beauty of the pure ideal upon which the system is founded.

But it is objected that the actual metre is not, after all, the exact ten-millionth part even of this particular quadrant. It is said to be too small by a fraction, minute indeed, but by no means inappreciable. This objection, which is apparently not without foundation, seems by some to be regarded as a sufficient reason for rejecting the metre as the basis of a system of weights and measures altogether. Such persons, to be logical, should reject equally every basis which purports to be a determinate part of any given dimension of the earth, whether it be of a meridian, or of the equatorial circumference, or of the polar axis, or of the equatorial or the mean diameter, unless this dimension shall be, or *until* it shall be, demonstrated to have been ascertained with absolute exactness. But that certainly is not the case at present with any of the dimensions just named. If anything is made apparent by an examination of the details of any of the great geodetic operations which have been carried on during the last two hundred years, it is that the earth is too irregular in figure to be regarded any more as an ellipsoid of three axes, as Gen. *de Schubert* and Capt. *Clarke* would make it, than as a simple oblate spheroid; and yet these gentlemen profess to assign the error of the metre, by comparing the quadrant passing through Paris, theoretically computed as a quadrant of such an ellipsoid, with the same quadrant as determined by the actual

measurement of its ninth part. But certainly this arc measured did not form part of a regular ellipse. Had that been true, the successive degrees measured would have exhibited, in proceeding from south to north, a regular and gradual increase in length. An increase was observed, but it was by no means regular. The whole arc being divided into three parts approximately equal, showed, in the southern division, a mean increase of 12.9 toises, in the middle division, an increase of 32.4 toises; and in the northern division, an increase of 5.5 toises only. When subsequently the arc had been extended northward to the latitude of Greenwich, and southward to the island of Formentera, making a total of  $12^{\circ} 48' 43''.89$ , or very nearly one-seventh of the quadrant, a similar division into *five* parts, (the northern, however, being less than the average of the others,) gave, in the southern division, a *diminution* going north, in direct contradiction to the theory of a flattened spheroid. The succession of values was then, for the southernmost division, a diminution of two toises per degree going north; for the second, an increase of 12.9 toises; for the third, an increase of 32.4 toises; for the fourth, an increase of 8.4 toises; and for the fifth, an increase of 7.23 toises. It is thus manifest that the diminution of curvature was least rapid in the middle of the arc, being more rapid both north and south of that point, which is not a characteristic of an elliptical curve. The scientific commission which fixed the length of the metre, had before it only the measurement from Mont Jouy to Dunkirk, of  $9^{\circ} 40' 45''.67$ . Two eminent geometers, members of this commission, *Laplace* and *Legendre*, found, from a comparison of the different sections of this arc, an ellipticity of 1-150th and 1-148th; but from a comparison of the whole with the arc of Peru, only an ellipticity of 1-334th. *Delambre*, who, with *Méchain*, had executed the measurement, found, from a similar comparison with the Peruvian arc, an eccentricity of 1-312th, and subsequently of 1-309th. Upon the extended arc, from Formentera to Greenwich, he made the eccentricity finally 1-178th. The commission fixed the metre at 443.296 French lines; but *Delambre* concluded, from his latest results, that the true length should be 443.320 lines; which, if correct, would show the metre of the commission to be too short by 1-460th of an English inch.

Degrees in the same latitudes, measured in different parts of the world, differ, in some instances, very sensibly. The length of the degree found by *Liesganig*, in Hungary, is materially less than that in the corresponding latitude in France. That found by *Mason* and *Dixon*, in Pennsylvania, is also considerably less than that of the French geodists between Formentera and Mont Jouy, both in latitude  $39^{\circ}$ . A very extraordinary anomaly is presented by the measurement of *Lacaille*, at the Cape of Good Hope, which gives, in latitude  $33^{\circ}$  S., a greater length than is found in France in latitude  $45^{\circ}$ . This determination, compared with the Peruvian arc, would imply, in the southern hemisphere, the extreme flattening of 1.78th.\*

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\* Little weight is attached to the measurement in Pennsylvania, it



Any two measurements anywhere made, when compared, give a different value for the compression of the polar regions; and these differences are moreover found as well in comparing different parts of the same measured arc, as in comparing different arcs. Col. *Everest*, in his report upon the northern section of the great meridian survey of India, has thus made comparisons upon twelve arcs, combined in forty-two different modes; and from every comparison he has deduced a different ellipticity, and different values of the earth's polar and equatorial diameters.\* Among the arcs thus compared are the Indian arc, the Russian arc, the French arc, the Swedish arc, and the Peruvian arc. The northern half of the northern section of the Indian arc, compared with the southern half of the same section, gives an eccentricity of 1-192nd; while the southern half of the northern section, compared with the whole southern section, gives one of 1-390th—about half the former.

The following remarks † of Col. *Everest* illustrate the futility of the attempt, in the present state of our knowledge, to ascertain, with anything like minute exactness, the true dimensions of the earth, from geodetic measurement. He says: "In making the selection of arcs, which are most worthy to be employed in these comparisons, it is utterly hopeless to escape the imputation of exercising the judgment arbitrarily, for the plain reason that what pleases one person will rarely satisfy the views of another. If, however, the elements be all authentically extracted, and their functional constants accurately computed, it can be of little moment what selection is made, provided a full exposition be afforded; for these elements and constants will materially facilitate the task of those who give the preference to any other arcs than those chosen." And further: "As each comparison gives an independent value of the major axis of the ellipse and of the compression, there arises a difficulty similar to that just alluded to, of fixing on the least objectionable method of finding the most probable mean result; to which the same observation is applicable, viz: that every geodesist is at liberty to use that which seems best to him, provided he gives a full explanation, and leaves the data free for others to employ in any manner they may deem preferable."

The conclusion at which we arrive from all this discussion is, that while the metre is probably somewhat in error, the amount of its error is uncertain, and that, if it were altogether correct we could not know it to

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having been made without triangulation, and with the chain alone. Gen. *de Schubert*, computing its length from his hypothetical spheroid, makes it 675 feet, or about one furlong, too short—the total length measured being nearly 102 miles. *Lacaille's* measurement has, moreover, been shown, by the more exact operations of *Maclear* and *Henderson*, to have been affected by a very material error of excess.

\* Similarly discordant results, obtained later by Gen. *de Schubert*, by comparisons made upon eight measured arcs, have been mentioned above. It may be thought by some that the citations from Col. *Everest*, which follow, have no longer any value; but it is too early yet to say that the old geodetic methods are entirely superseded.

† *An Account of the Measurement of two Sections of the Meridional Arc of India, &c.* By Lieut. Col. EVEREST. London, 1847. The citations are from p. 425.

be so. *Delambre*, the distinguished geodesist, whose labors contributed so largely to furnish the basis on which the international commission of 1799 established their determination of the metre, and himself a member of that commission, makes the defect of length about equivalent to 1-460th of an inch. Sir *John Herschel*, computing from the data furnished by *Airy*, *Bessel* and *de Schubert*, puts it at 1-208th of an inch. The same authority, computing from the results of Capt. *Clarke*, advances the magnitude of the error from 1-208th to 1-163rd of an inch. And Capt. *Clarke* himself, in his later computation, published in 1866, in a volume issued by the Ordnance Survey, gives it at the somewhat reduced value of 1-173rd. Finally, from the direct consideration of the French geodetic measurement itself, we have some reason, as will presently be made to appear, to suppose that these valuations may be, one and all, too great. But what is beyond any question is, that no two geodesists, though starting from the same facts, ever reach precisely the same result; that every addition to the data must modify every previously formed deduction; and that the time will probably never arrive when the length of any meridional quadrant will be known with absolute exactness.

It will of course be understood, and it has been stated already, that the manner of arriving at *any* value of the imputed error, is by comparing a calculated value of a hypothetical quadrant of a presumed regular ellipsoid of three axes, with the length of an actual quadrant of the earth itself, as determined by the direct measurement of its ninth part. Now, it so happens that the French arc, upon the measurement of which the metre is founded, is so situated as to give very nearly the length of the mean degree; that is, of a degree scarcely at all affected by the ellipticity of the meridian, whether that be greater or less. The limiting latitudes are Mont Jouy,  $41^{\circ} 22' 42''.4$ , and Dunkirk,  $51^{\circ} 2' 9''.7$ , of which the sum exceeds a quadrant by but about two and one-third degree. If this sum had been just  $90^{\circ}$ , the influence of the ellipticity upon the length of the metre would have been practically inappreciable. In the actual case, the substitution of the ellipticity found by Gen. *de Schubert*, for that employed by the scientific commission, would not have affected this length by so much as the fifty-thousandth part. The possibilities of error, which always exist, to the extent of a second or two, and inevitably to fractions of seconds, in the latitudes of the terminal stations, may introduce a larger degree of uncertainty than this—an uncertainty which diminishes, however, as the amplitude of the arc is greater.

The error, then, if it exists, is thus drawn upon the process of measurement. According to the computation of Sir *John Herschel*, from the data of Gen. *de Schubert*, the international commission of 1799 made their quadrant too short by 4,008 British feet. From Capt. *Clarke's* results he deduces the larger error of 5,124 feet; but Capt. *Clarke* himself gives the length of the quadrant passing through Paris as being 1,472.5 metres in excess of ten million, which is equivalent to an error of 4,831 British feet. Hence, the original measurement must have been wrong to the extent of 445 feet, (the ninth part of 4,008,) if we adopt the first conclusion,

or of 537 feet, (the ninth part of 4,831,) if we prefer the second. Now, a test of the accuracy of the geodetic work, as it was actually conducted, may be found in the fact that the base of verification at Perpignan, 6,006·249 toises in length, having been determined by computation through a chain of fifty-three triangles, from the base at Melun, distant 33,000 toises, was found to be apparently of the length of 6,006·089 toises; so that between the length as measured and the length as computed, there was a discrepancy of only sixteen-one-hundredths of a toise. As in 33,000 there are five and a half times 6,000, this error indicates a possible error five and a half times greater on the whole distance between the bases; that is to say, nearly T. 0·88. Then as the whole arc measured was 551,485 toises, or seventeen times 33,000, the total error on the whole distance might have been possibly T. 15; which is equivalent to ninety-six feet nearly. The probabilities are, therefore, that the length of the quadrant, as determined by *Méchain* and *Delambre*, is not in error more than about 860 feet, if as much; and that the possible error of the platinum metre of the Archives, instead of amounting to 1-200th of an inch, does not exceed 1-960th.\*

It is not a matter of any practical importance, however, what is the supposed value of this minute fraction. There can be no doubt that every new meridional measurement will furnish material to the geometers for new investigations and new results; nor is it probable that it will soon be settled what is the true length of any meridian. The lecture of Sir *John Herschel*, which contains the strictures upon the correctness of the French survey above noticed, itself furnishes evidence of the instability of the so-called constants of the earth's figure. The original text of the lecture gives, under date of September 30, 1863, one set of values for the polar axis; the semi-axes of the equatorial ellipse, and the positions of these semi-axes; the ellipticity of the French meridian; and the (inferential) error of the metre; and an appendix of October 11, in the same year, gives another set complete; while a postscript to the appendix, without date, informs us of still more recent modifications of these last determinations.†

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\* Mr. *Delambre*, who arrives, by a different course of reasoning, at the same result, *i. e.*, fifteen toises for the possible error, observes that the mean should be taken between observation and calculation, *viz.*: 7·5 toises; which would reduce the probable error of the metre to the 1,920th; say the 2,000th part of an inch.

All these deductions, however, as well as those of *de Schubert* and *Clarke*, are founded on the assumption that the earth's quadrants, if not equal, are at least truly elliptical in curvature. But this appears not to be the case with any of them; so that the only way to arrive at absolute certainty in regard to the length of any one, will be to measure it actually from end to end—a method manifestly impracticable.

† The numbers here referred to are those of Capt. *Clarke*, already mentioned. Sir *John Herschel*, like Prof. *Piazzi Smyth*, and some others, seems to have indulged a sort of fond hope that the earth's axis would ultimately prove to measure exactly 500,500,000 British inches. His own determination had made it 500,497,056. Capt. *Clarke's* first result reduced

The suggestion of Sir *John Herschel*, that the polar axis of the earth would have been a more felicitous choice as the basis of a metrical system than the length of any meridian, or than any other known natural dimension, will probably be undisputed in any quarter. This is a dimension which is entirely unique; and being the common axis of all meridians, belongs equally to all the world. But if absolute accuracy is insisted on, it will no more be found in this axis than in the meridians, though the magnitude of the probable error may be less. Sir *John Herschel* himself gives seven different determinations; one from *Airy*, one from *Bessel*, three from *de Schubert*, one from himself, and one from *Clarke*. The difference between the maximum and the minimum among these, is more than 15,000 feet. Col. *Everest*, as stated above, has given forty-two, found by taking different arcs by pairs. These he has subsequently combined in various ways, for the purpose of obtaining mean results; the number employed to obtain a single mean varying from five to nine. The difference between the maximum and the minimum of the means thus obtained, is nearly 19,000 feet. The extremes of course differ much more widely, as do those found by *de Schubert*.

Though it is to be regretted that the earth's axis had not been originally selected as the basis of the world's system of weights and measures, yet the regret arises rather from a sense of the superior beauty, simplicity, and scientific perfection in the ideal of a system founded upon such a basis, than from any practical disadvantage resulting from the choice actually made. No matter what may be the numbers used hereafter to express the length of the earth's axis or of its meridians, the metre will always be the length of the platinum bar definitely declared to be its representative by the international scientific commission of 1799.

Besides the objection to the scientific basis of the metrical system, other objections of a more practical nature have been urged against some of its particular features. All these have been brought together in the exhaustive report of Mr. *Adams*, already referred to, and may be briefly examined as they are presented there.

Mr. *Adams* first objects to the *length* of the metre, as being too great for convenience as a unit of measure. "Perhaps," he says, "for half the occasions which arise in the life of every individual for the use of a linear measure, the instrument, to suit his purposes, must be portable, and fit to be carried in his pocket. Neither the metre, the half metre, nor the decimetre is suited to that purpose." Without stopping to inquire how far the foot-rule may be more fit to carry in the pocket than the decimetre, it is sufficient here to observe that, if a measure of three decimetres in length (which is almost exactly a foot) should be found to be

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this result to 500,490,433; and it was gratifying, therefore, to be able to announce in the postscript that his later corrections "had made the polar axis approximate *still more nearly* to 500,500,000 inches." The final determination, published in 1866, however, carries it farther off from this favorite value than any of the foregoing, since it gives it at 500,482,296.

more convenient and more portable than an entire metre, anybody who chooses to carry such a rule in his pocket can do so ; and the facility with which measures made with such a rule may be converted into meters is such, that it is impossible to find any solid ground for objection in the fact that such a conversion will be necessary. But if, for common purposes, this measure continues to be called a foot (or a foot metric, to distinguish it for the time from the old foot), and the conversion is not practiced at all, it is not apparent what harm can arise ; while, for any purpose of computation, the conversion could be immediate ; so that all the advantages of the metric system could be secured, without really encroaching sensibly in this respect upon the ordinary habits of men. The new foot would fall short of the old one by not quite 19-100ths of an inch. This difference is considerably less than exists now between the Danish and the Austrian foot measures, on the one hand, and the British, on the other ; the first being in excess by 36-100ths of an inch, and the second, by nearly 45-100ths ; or between the British and the Swedish, which latter is in deficiency by 36-100ths ; or between the British foot and the foot of Frankfort-on-the-Maine, which falls short by eight-tenths of an inch. This new foot, moreover, perfectly accords with the foot measure of Switzerland, which has been made by law exactly three decimetres.

But though it is thus apparent that for practical purposes, a measure may be used which is, for all the ends of convenience, equivalent to the foot, and which is still in perfect harmony with the metric system, it does not appear that there is any want of practical portability in the metre itself. Notwithstanding Mr. *Adams's* defense of the foot-rule, on the ground that it is "an instrument fit to be carried in the pocket," it is presumed that few people so carry this instrument, except in a folding form ; and in this form the metre may be carried, and is, in point of fact, carried, with equal convenience. Moreover, inasmuch as the yard is found, after all, to be the measure best adapted to the occasional uses for which necessity arises in the ordinary occurrences of life, the portable measure most frequently found in men's pockets is a *tape* measure, of the length of one or two yards—a measure which is put up in a form greatly more compact than any rule can be.

Besides the foot-metric, of three decimetres, it is perfectly practicable and permissible, if any one desires it, to use a rule of a half metre or of a quarter metre, or of any other fraction of a metre in length. If the acceptance of the metric system were to impose upon a people any mental or legal incapacity ever to divide anything more into two equal parts, we might do well to hesitate long before laying ourselves under such a disability. But it is to be presumed that people will do what they find it convenient to do, after as well as before the introduction of the new system. They will gain from this system all the power which it derives from its decimal relations, and all the benefit which results from being in harmony with the rest of the world, without losing any real advantage which other relations may furnish in the ordinary transactions of life.

Mr. *Adams* objects to the metre, that it does not correspond with any known dimension of the human body ; and that thus its substitution for

the unit at present in use in the United States will deprive the people of a resource which they now find convenient for ascertaining the length of the unit in the absence of a rule measure. But the foot, certainly, cannot be determined by any such reference to the person, though it is possible that the yard may be. As a general rule, the yard found by holding one end of a string between the thumb and finger of the arm extended horizontally, and "marking the point which can be brought to touch the centre of the lips, (facing full in front,)" in accordance with the direction given by Sir *John Herschel*, will be a short yard; and the face should be inclined to the direction opposite the extended arm, to make it true. But if, instead of marking the point which touches the centre of the lips, the experimenter carry the string across the lips as far around as the angle of the jaw, he will have pretty accurately a metre. Or, otherwise, if the string be carried horizontally across the breast, the point characteristic of that part of the person, on the side opposite the extended arm, will mark the metre. The present value of the foot, notwithstanding its name, is, in England and the United States, manifestly a derivative from the yard, of which it is a third part. The length of the human foot is neither a third part nor a fourth part of the arm, measured (as above) to the lips, but it is, with a very near approach to exactness, the fourth part of a metre; so that a man of ordinary stature and normal proportions could easily reproduce the metre with sufficient accuracy for ordinary uses, by simply measuring his uncovered foot.\*

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\* Mr. *Adams* rather exaggerates the importance of that property of a unit of measure which identifies it in some way with the human person. And one of his illustrations of this importance seems to prove something which he did not intend. "When the Russian general, *Suwarrow*," he observes, in his "*Discourses under the Trigger*," said to his troops, 'a soldier's step is an arsheen,' [archine,] he gave to every man in the Russian army the natural standard of the long measure of his country. No Russian soldier could ever afterward be at a loss for an arsheen." Without having the text of the "*Discourses*" at hand, one may well doubt whether the rough old general was not here designing to convey an idea purely military, rather than to contribute to the elementary education of his troops; the idea, that is to say, that a step having a length equal to an archine, is the step which will enable men to get over the most ground in a given time and with the least fatigue; and is, therefore, a soldier's step, or the step a soldier should cultivate. And his reference to the archine was apparently a reference to something the soldier was presumed to know already, rather than to something he ought to learn. But if an archine, which is twenty-eight inches, is a soldier's step, how comes it that a farmer's step, in the United States and England, is thirty-six inches? The fact is, that the pace, whether an archine or a good yard in length, though commonly spoken of as a natural unit, is an artificial step, which cannot be usefully employed without some practice. And whoever, equally without practice, attempts to ascertain the length of the yard in the manner mentioned in the text, will find that his results are variable, and few of them exact.

None of the (average) dimensions of the human frame answer perfectly to any determinate values of the prevailing measures of length; and it is as easy to find modes of deriving approximate metrical lengths from the person as any other.

Mr. *Adams* speaks of the antiquity of the foot as indicating that it has been determined in its length by some inherent property of convenience which belongs to no other measure. But looking at the world's entire history, the foot seems to be of comparatively modern origin. The cubit was the unit of the antediluvian world. The foot was not known to *Noah* when he laid the keel of the ark; nor to *Cheops* when he raised the great pyramid of *Ghizeh*; nor to *Moses* when he erected the tabernacle in the wilderness; nor to *Solomon* when he built the first temple at Jerusalem; nor to *Zerubabel* when he built the second. It is evident, therefore, that there is nothing in the nature of things which makes it necessary that the foot should be retained.

Mr. *Adams* regards it as a serious defect of the metric system that it provides only one series of weights for all commodities, and one series of measures for all capacities. The early weights and measures of Great Britain, on the other hand, which her colonists carried with them to the western continent, embraced double units both of weight and of measure, related to each other as the specific gravities of corn and wine. If a counterpoised vessel on being filled with wine required a pound weight avoirdupois to restore the equilibrium, the same vessel filled with corn would require a less weight to do the same; and this determined the pound Troy. In like manner, if the wine which fills a vessel of given capacity, balance a pound weight avoirdupois, a vessel of larger capacity will be required in order that the grain which fills it may produce the same equiponderance. The advantages which such an adjustment apparently affords, seem to have impressed Mr. *Adams* very forcibly: yet he admits that, in England, the proportion has been lost in the measures of capacity; and that, as it respects weight, it is practically of no use in the United States. Three or four years after his report was presented, the British Parliament abolished the double measures of capacity altogether. Among the minor arguments alleged by Mr. *Adams* in favor of the preservation of both, that is the double units both of weight and capacity, is the rather curious one that retail dealers may sometimes (as in the case of drugs) buy by avoirdupois weight, and make a profit in selling by Troy. Innukeepers, also, (such was at the time the case in Pennsylvania,) may, under this system, buy their ale by the larger measure, and sell advantageously at retail by the lesser. "In both cases," he remarks, "the difference of the measure forms part of the compensation for the labor and skill of the apothecary, and part of the profits necessary to support the establishment of the publican." Such an argument in the mouth of a statesman excites surprise. What has the legislature to do with compensating the labor and skill of the apothecary, or helping the tavern-keeper to keep up his establishment? And why should the dry-goods dealer be prevented from selling (by a process unperceived by the customer) four yards for the fair price of five, when the druggist is enabled (by a similar expedient) to sell four pounds for the price of five? To the world of the present day, there can be no doubt that the existence of two systems of weight and measure side by side, however connected by proportion, is simply a nuisance; and argument upon this

point would be thrown away. The additional suggestion of Mr. *Adams*, that the two standards of weight serve to verify each other, being in the known ratio of 5,760, to 7,000, so that in case one be lost and not the other, the latter will serve to replace the former, is too unsubstantial to require remark. The occurrence of the contingency here spoken of as possible, is wholly inconceivable.

Mr. *Adams* further says that the metric system, while giving the weight of a single substance (distilled water) when the bulk is known, gives the weight of nothing else; whereas the old British weights and measures gave the weight of both corn and wine. Mr. *Adams* has here selected for censure a point in which one of the greatest merits of the metric system lies. So far from giving the weight of nothing else but water, it gives the weight of everything else. This matter has been already so fully illustrated that it may here be dismissed without further argument.

It is made still further a matter of reproach to the metric system by Mr. *Adams*, that the system has not yet been extended—he would make it appear to have been found impracticable to extend it—to geography and navigation (latitude and longitude) or to the division of the circle: and that this failure furnishes pretty strong evidence that the theoretically simple may not seldom be at war with the practically useful.

To this reproach it may be replied that the extension of the system to the subjects mentioned *has* been made and found to be advantageous; but that it has not seemed indispensable or even very important to press a change in this respect; inasmuch as the terrestrial co-ordinates and the division of the circle were precisely the matters, (and except the Arabic numerals and the symbols of algebra, the only matters,) upon which all the world were in perfect harmony before the metric system was conceived. To press the change as to other matters would be to promote unity: To introduce it here would, for the time being, simply create diversity. The time may possibly come when the sexagesimal division of the circle will be abandoned for the centesimal; but this will only be by common consent, after the metric system in respect to other matters shall have been universally received. Centesimal tables of the trigonometrical functions were constructed, and circular instruments were centesimally divided, during the early years of the first French Republic.

That they were found convenient by those who used them is sufficiently established by the testimony of *Delambre*, who makes the following statement; “Trois de nos quatre cercles étoient devisés en grades ou degrés décimaux valant chacun  $360^\circ \div 400 = 0.9^\circ = 54' = 3240''$ .” *Cette division est beaucoup plus commode pour l'usage du cercle répétiteur, et le seroit également pour les verniers de tous les instruments quelconques. Plusieurs personnes tiennent encore à l'ancienne division par habitude et parce qu'elles n'ont fait aucun usage de la nouvelle; mais aucun des ceux qui les ont prantiquées toutes deux, ne veut retourner à l'ancienne,*”\*

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\* *Delambre, Base du système métrique décimal, Tome I, p. 98.*



*Delambre* proceeds to explain how the ordinary tables may be used with centesimally divided instruments, or centesimal tables with the ordinary instruments; sexagesimal arcs (or for present purposes we may say *nonagesimal*) being converted into centesimal by adding one-ninth to the numerical expressions of their value; and centesimal reduced to nonagesimal, by subtracting one-tenth. It appears, therefore, not to be true, as imputed, that the non-extension of the decimal system into trigonometry, geography, and astronomy, is an evidence of its ill-adaptation to the objects of those sciences; this non-extension has been owing, on the other hand, to the fact that there already exists a uniformity of practice throughout the world in the methods of these sciences, which it is not important immediately to disturb; with the additional fact that the existing system is so interwoven with every form of scientific publication that it could not be suddenly changed without an inconvenience as universal as is the present prevalence of the system itself.

The final objection of Mr. *Adams* to the metric system is found in its nomenclature. Yet, regarded as a scientific creation, he looks upon this nomenclature as admirable. His objection to it is, that the people cannot possibly be made to use it. "The theory," he says, "of this nomenclature is perfectly simple and beautiful. Twelve new words, five of which denote the things, and seven the numbers, include the whole system of metrology; give distinct and significant names to every weight, measure, multiple, and subdivision of the whole system; discard the worst of all the sources of error and confusion in weights and measures, the application of the same name to different things; and keep constantly present to the mind the principle of decimal arithmetic, which combines all the weights and measures, the proportion of each weight or measure with all its multiples and divisions, and the chain of uniformity which connects together the profoundest researches of science with the most accomplished labors of art and the daily occupations and wants of domestic life in all classes and conditions of society. Yet this is the part of the system which has encountered the most insuperable obstacles in France. The French nation have refused to learn or repeat these twelve words. They have been willing to take a total and radical change of things; but they insist upon calling them by old names. They take the metre, but they must call one third part of it a foot. They accept the kilogramme; but instead of pronouncing its name, they choose to call one half of it a pound. Not that the third of a metre is a foot, or the half of a kilogramme is a pound; but because they are not very different from them, and because, in expressions of popular origin, distinctness of idea in the use of language is more closely connected with habitual usage than with precision of expression."

This quotation is given at full length, because it presents, in the first place, the merits of the nomenclature so distinctly as to render any words on that point unnecessary; and because, secondly, it exhibits very precisely the nature of the difficulty which is said to render the system objectionable. A reply might be, that things are things and names are names. It is the things that are of primary importance; names occupy

only the secondary rank. If, as Mr. *Adams* says, the things are accepted while the names are rejected, be it so for the time. The main point is gained. The names will be accepted later. The illustration which Mr. *Adams* himself brings from the history of his own countrymen in their treatment of the Federal coinage and its nomenclature, was in point with him then, and is in point with us now. The people knew the name "dollar," but they knew nothing of dimes, cents and mills. Their smaller moneys were shillings and pence; and these denominations were in their mouths for years after the creation of the Federal currency, and are not even yet forgotten. Mr. *Adams* says, "It is now nearly thirty years since our new moneys of account, our coins and our mint, have been established. The dollar under its new stamp has preserved its name and circulation. The cent has become tolerably familiarized to the tongue wherever it has been made by circulation familiar to the hand. But the dime having been seldom, and the mill never, presented in their material images to the people, have remained so utterly unknown, that now, when the recent coinage of dimes is alluded to in our public journals, if their name is mentioned, it is with an explanatory definition to inform the reader that they are *ten cent pieces*; and some of them, which have found their way over the mountains, by the generous hospitality of the country have been received for more than they were worth, and have passed for an eighth, instead of a tenth, part of a dollar." Since this paragraph was written, the people of the United States have learned perfectly the name as well as the appearance of the dime; and, during the same period, the French people have equally learned the nomenclature of their system of weights and measures. The lesson was in their case an especially hard one to learn, and one which took much time, because it was forced upon them without any preliminary preparation. That is an error which will nowhere be repeated in the future.

It is evident, throughout the report of Mr. *Adams*, that his own unwillingness to see an attempt made toward the introduction of the metric system of weights and measures into the United States, grew out of the popular resistance made to its acceptance by the people of France; and a belief, from which he seems to have been unable to escape, that it never would, or at least would not soon, become dominant in the country in which it originated. The state of things which existed at the time his report was written was not ill suited to produce such a belief. It is described by him in the following words: "The result of the most stupendous and systematic effort ever made by a nation to introduce uniformity into their weights and measures, has been a conflict between four distinct systems.

"1. That which existed before the revolution.

"2. The temporary system established by the law of 1st August, 1793.

"3. The definite system established by the law of the 10th December, 1799: And,

"4. The *usual* system, permitted by the decree of 12th February, 1812.

"This last decree is a compromise between philosophical theory and inveterate popular habits. Retaining the principle of decimal multiplication and division for the legal system, it abandons them entirely in the weights and measures which it allows the people to use."

This "usual system" permitted the employment of old names, and also of old divisions, both binary and duodecimal. But it did not restore the old *things*; for all the weights and measures allowed were derived from the metric units. Mr. *Adams* wrote in 1831. The prospect of the speedy triumph of the system even in France appeared to him at that time to be anything but encouraging. Sixteen years later, however, the *usual* system was abolished; and since that time—that is, for more than thirty years—nothing more has been heard of that resistance on the part of the French people to the use of metric weights and measures, or of their refusal to learn their nomenclature, or of their discontent with the decimal principle, which Mr. *Adams* evidently believed to be hopelessly confirmed, and which so much excited his apprehension.

Mr. *Adams's* able report embodies, and presents in a forcible manner, all the material objections which have ever been raised against the metric system; and in answering him, all other objections are answered at the same time. It is worth while now to cite his own personal opinions of the merits of this system, and his hopes as to the future which may yet be in reserve for it, in spite of the (to his view) unpromising aspect of things in his own time. He remarks, "The French system embraces all the great and important principles of uniformity which can be applied to weights and measures, but that system is not yet complete. Considered merely as a labor-saving machine, it is a new power offered to man, incomparably greater than that which he has acquired by the new agency which he has given to steam. It is, in design, the greatest *invention* of human ingenuity, since that of printing; but like that, and every other useful and complicated invention, it could not be struck out perfect at a heat. Time and experience have already dictated many improvements of its mechanism, and others may, and undoubtedly will, be found necessary for it hereafter. But all the radical principles of uniformity are in the machine, and the more universally it shall be adopted, the more certain will it be of attaining all the perfection which is within the reach of human power." By the "improvements," here mentioned as having been made in the system, are intended probably those modifications which were authorized by the law of 1812—the law which created the "usual system." Subsequent experience has shown that those modifications were mainly unnecessary; and that the system, though originally "struck out at a heat," was produced as nearly perfect as any creation of human origin is ever likely to be. The lesson of this experience must be kept still in mind in reading the following glowing eulogy of the system, from another part of the same report:

"This system," says Mr. *Adams*, "approaches to the ideal perfection of *uniformity* applied to weights and measures, and whether destined to succeed or doomed to fail, will shed unfading glory upon the age in

which it was conceived, and upon the nation by which its execution was attempted, and has been in part achieved. In the progress of its establishment there, it has been often brought in conflict with the laws of physical and moral nature—with the impenetrability of matter, and with the habits, passions, prejudices, and necessities of man. It has undergone various important modifications. It must undoubtedly still submit to others, before it can look for universal adoption. But if man be an improvable being; if that universal peace, which was the object of a Saviour's mission, which is the desire of the philosopher, the longing of the philanthropist, the trembling hope of the Christian, is a blessing to which the futurity of mortal man has a claim of more than mortal promise; if the spirit of Evil is, before the final consummation of all things, to be cast down from his dominion over men, and bound in the chains of a thousand years, the foretaste here of man's eternal felicity; then this system of common instruments to accomplish all the changes of social and friendly commerce, will furnish the links of sympathy between the inhabitants of the most distant regions; the metre will surround the globe in use as in multiplied extension; and one language of weights and measures will be spoken from the equator to the poles."

The period thus clearly foreseen, at which all the world, on a subject so nearly affecting the daily and hourly interests of its inhabitants of every race and country, shall be "of one language and of one speech," is certainly much nearer than the eloquent prophet could have anticipated when these words were written. "Opinion," which he elsewhere says, "is the queen of the world," without whose favoring voice no great measure of public policy can be pressed to a successful consummation, has marched with a rapidity which he certainly by no means contemplated; so that, already, that uniformity for which he longed, but hardly dared to hope, except as a crowning glory of the millenium, has been reached by nearly half the population of the civilized and Christian world, and promises at no distant day to prevail universally.

In anticipation of the period at which the metric system shall be introduced among the peoples by whom it has not yet been received, it becomes the governments of those peoples to make such preparation for the changes which it will bring, as shall prevent the inconvenience and confusion which attended its first introduction into France. To this end, first of all, the principles of the system should be thoroughly taught in all the schools for the education of the young. Let but a single generation be thus instructed, and the obstacle to change which has been found in men's inveterate habits of thought, will be practically removed. Let there then be a progressive introduction of the denominations of the system into different branches of the public service successively; beginning with those which concern international relations, as for instance, the collection of the revenue from customs, and the foreign postal and telegraphic service; and subsequently advancing to matters of internal administration, such as the construction of public works, the management of the navy yards, of the military posts, and of mines operated by gov-

ernments, the statements of the census and statistical bureaux, &c. ; so that at length, when the people shall have become sufficiently familiarized with the system, by seeing these examples of its application, it may be extended to commerce and to the ordinary affairs of private life. An additional advantage may be secured, by adopting the practice of stating, for a time at least, all quantities or values specified in public documents, in duplicate form ; the first being the metric numbers, and the second the numbers belonging to the familiar system. By means of this expedient, every such document will become an educational lesson, and the people will become familiarized with the system almost without knowing it. This is, in general, the plan which, by a unanimous vote of the international conference of weights, measures and moneys, held in Paris in June, 1867, was recommended for adoption to the governments of all nations which have as yet taken no steps looking to the introduction of the metric system among them. It is to be hoped that the recommendation will not be permanently disregarded by any.

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While these pages are passing through the press, there has been received a compendious treatise on the metric system, prepared by Prof. *Leone Levi*, of London, Honorary Secretary of the Metric Committee of the British Association, and published in June, 1871, from which are derived some additional facts in regard to the progress of metrological reform. The most important of these relates to British India. It is stated that, by an act passed in 1870, with the approval of the home government, the kilogramme is adopted as the unit of weight in India, and the metre as the unit of length ; and the Governor-General in Council is empowered to cause the new weights and measures to be used by any government office or municipal body or railway company ; and to *require* that, after a date to be fixed, these weights and measures shall in every district be the basis of all dealings and contracts in any specified business or trade.

In Wurtemberg, Bavaria, and Baden, additional progress has been made by laws, initiated or passed in 1868 and 1869, toward the introduction of the metric system in full.

In Roumania, the metric system has been established by law since January 1st, 1865.

On the American continent the metric system has been established in the Republic of Equador since 1856, and in Peru since 1863. In Venezuela, the government proposed to Congress the introduction of the system as long ago as 1856.

From the report of the International Conference of 1867, on weights and measures and coinage, it appears that Turkey has given a metric value to her unit of length, the Turkish archine having been made equal to three-fourths of a metre.

From Prof. *Levi's* work, and from other sources, are derived the following numbers, representing the populations which have adopted the metric

system in full, and those which have adopted metric values for their units.

**I. Peoples adopting the metric system in full.**

State.	Year.	Population.
France.....	1866	38,067,064
French Colonies.....	1866	2,921,000
Holland.....	1868	3,638,467
Dutch Colonies.....	1868	22,453,000
Belgium.....	1868	4,839,094
Spain.....	1868	16,642,000
Spanish Colonies.....	1868	2,030,000
Portugal.....	1863	4,349,000
Italy.....	1868	25,527,000
North German Confeder..	1867	29,910,517
Greece.....	1864	1,348,522
Roumania.....	1867	4,605,000
British India.....	1866	150,767,851
Mexico.....	1865	8,218,080
New Granada.....	.....	2,800,000
Ecuador.....	1858	1,040,000
Peru.....	.....	3,374,000
Brazil.....	1867	9,858,000
Uruguay.....	.....	387,000
Argentine Confederation.	1869	1,736,000
Chili.....	1868	1,908,000
Total.....	.....	336,419,595

**II. Peoples adopting metric values.**

State.	Year.	Population.
Wurtemberg.....	1867	1,778,396
Bavaria.....	1867	4,824,000
Baden.....	1867	1,438,000
Hesse.....	1852	854,319
Switzerland.....	1860	2,510,494
Denmark.....	1856	2,413,000
Austria.....	1867	34,861,000
Turkey.....	.....	35,360,000
Total.....	.....	84,039,209

**III. Countries in which the metric system is permissive.**

State.	Year.	Population.
Great Britain.....	1871	31,817,108
United States.....	1870	38,525,729
Total.....	.....	70,342,837

**IV.** In Sweden (population [1867] 4,195,681) and Norway ([1867] 1,701,478 = total 5,897,159) the decimal division has been adopted, without as yet the metric values.

As the peoples in the second class above may be regarded as committed to the ultimate adoption of the metric system in full, we may count as already enlisted on this side of the question, a total of about 420,000,000.

On the 26th of July, 1871, an act making the metric system of weights and measures henceforth compulsory in Great Britain, was lost by a majority of only five votes in the House of Commons.

**ARTICLE 509.** The metric system of weights and measures adopted for international purposes.

510. The metric system to be employed in negotiations and intercourse between governments.

511. Customs duties to be levied by metric weight and measure, and postal tariffs to be regulated by metric weight.

512. Standard units of length and of weight.

513. Copies of the standards to be made and carefully preserved, as standards of verification.

514. Working standards, or standards for daily use, to be constructed and periodically verified.

ARTICLE 515. Standard measures of capacity.

516. Certain denominations, not decimally related to the units of length, capacity, surface and weight, to be allowed.

*The metric system of weights and measures adopted for international purposes.*

509. All contracts for the purchase of movable property of any description, and all accounts rendered for the sale or delivery of such property, when the parties to the transactions belong to different nations, shall be expressed, as to the quantities specified, in denominations of the system of weights and measures known as the metric system; and the denominations of such metric system named in the following tables shall be taken as equivalent to the values set opposite to them, in the denominations of the several systems of national weights and measures therein named.

*Tables exhibiting the Metric Equivalents of the principal Units of Weight and Measure at present in use in the civilized world.*

NOTE.—From these Tables are omitted the names of all countries in which the metric system of weights and measures already prevails. The authority mainly relied on in computing these equivalents has been ALEXANDER'S "*Dictionary of Weights and Measures*," Baltimore, 1850; a work of remarkable comprehensiveness and singular accuracy. Use has also been made of the "*Rapports et proces-verbaux du Comité des Poids et Mesures et des Monnaies*," Paris, 1837; and of the "*Second Report of the Standards-Commission*" of the British Parliament, London, 1869.

I. *Equivalents of Units of Weight.*

Country.	Non-metric Units in Metric Units.	Metric Units in Non-Metric Units.
Austria.....	1 Pfund..... = 0.56004 kilog.	1 Kilogramme = 1.7857 Pf.
Baden.....	1 Pfund..... = 0.500 "	1 " = 2.000 Pf.
Bavaria.....	1 Pfund..... = 0.500 "	1 " = 2.000 Pf.
Denmark.....	1 Pund..... = 0.500 "	1 " = 2.000 P.
Great Britain.....	1 Pound(avoir.) = 0.4536 "	1 " = 2.2046 P.
Prussia.....	1 Pfund..... = 0.500 "	1 " = 2.000 Pf.
Russia.....	1 Founte..... = 0.4090 "	1 " = 2.445 F.
Saxony.....	1 Pfund..... = 0.500 "	1 " = 2.000 Pf.
Sweden.....	1 Skalpund.... = 0.42514 "	1 " = 2.353 Sk.
Switzerland.....	1 Livre..... = 0.500 "	1 " = 2.000 L.
United States.....	1 Pound(avoir.) = 0.4536 "	1 " = 2.2046 P.
Wurtemberg.....	1 Pfund..... = 0.500 "	1 " = 2.000 Pf.

II. *Equivalents of Units of Length.*

Country.	Non-Metric Units in Metric Units.		Metric Units in Non-Metric Units.	
Austria .....	1 Fuss	= 0·316 Metre .....	1 Metre	= 3·1634 F.
Baden .....	1 Fuss	= 0·300 " .....	1 "	= 3·3333 F.
Bavaria .....	1 Fuss	= 0·2919 " .....	1 "	= 3·4263 F.
Denmark .....	1 Fod	= 0·3139 " .....	1 "	= 3·1862 F.
Great Britain.	1 Foot	= 0·3048 " .....	1 "	= 3·2809 F.
Prussia .....	1 Fuss	= 0·3139 " .....	1 "	= 3·1862 F.
Russia .....	1 Sagene	= 2·13353 " .....	1 "	= 0·4687 S.
Saxony .....	1 Elle	= 0·5665 " .....	1 "	= 1·7651 E.
Sweden .....	1 Fot	= 0·29608 " .....	1 "	= 3·3774 F.
Switzerland..	1 Pied	= 0·3000 " .....	1 "	= 3·3333 P.
United States	1 Foot	= 0·3048 " .....	1 "	= 3·2809 F.
Wurtemberg.	1 Fuss	= 0·2865 " .....	1 "	= 3·4435 F.

*Itinerary Measures.*

Country	Non-Metric Units in Metric Units.		Metric Units in Non-Metric Units.	
Austria .....	1 Meile	= 7·58647 Kilometres ..	1 Kilometre	= 0·1318 Meile
		= 5·05765 Miles-Metric.	1 Mile-Metric	= 0·1977 "
Baden .....	1 Meile	= 8·8889 Kilometres ..	1 Kilometre	= 0·1125 "
		= 5·9259 Miles-Metric.	1 Mile-Metric	= 0·1687 "
Bavaria .....	1 Meile	= 7·4259 Kilometres ..	1 Kilometre	= 0·1347 "
		= 4·9506 Miles-Metric.	1 Mile-Metric	= 0·2021 "
Denmark ....	1 Mill	= 7·5316 Kilometres ..	1 Kilometre	= 0·1327 Mill
		= 5·0211 Miles-Metric.	1 Mile-Metric	= 0·1990 "
Great Britain.	1 Mile	= 1·6093 Kilometres ..	1 Kilometre	= 0·6214 Mile
		= 1·0729 Miles-Metric.	1 Mile-Metric	= 0·9321 "
Prussia .....	1 Meile	= 7·5325 Kilometres ..	1 Kilometre	= 0·1328 Meile
		= 5·0217 Miles-Metric.	1 Mile-Metric	= 0·1992 "
Russia .....	1 Viersta	= 1·06678 Kilometres ..	1 Kilometre	= 0·9374 Viersta
		= 0·71119 Miles-Metric.	1 Mile-Metric	= 1·4061 "
Saxony .....	1 Meile	= 6·7945 Kilometres ..	1 Kilometre	= 0·1472 Meile
		= 4·5297 Miles-Metric.	1 Mile-Metric	= 0·2208 "
Sweden .....	1 Mil	= 10·6593 Kilometres ..	1 Kilometre	= 0·0938 Mil
		= 7·1062 Miles-Metric.	1 Mile-Metric	= 0·1407 "
Switzerland..	1 Lieue	= 4·8000 Kilometres ..	1 Kilometre	= 0·2083 Lieue
		= 3·2000 Miles-Metric.	1 Mile-Metric	= 0·3125 "
United States	1 Mile	= 1·6093 Kilometres ..	1 Kilometre	= 0·6214 Mile
		= 1·0729 Miles-Metric.	1 Mile-Metric	= 0·9321 "
Wurtemberg.	1 Meile	= 7·4074 Kilometres ..	1 Kilometre	= 0·1350 Meile
		= 4·9383 Miles-Metric.	1 Mile-Metric	= 0·2025 "

III. *Equivalents of Units of Liquid Capacity.*

Country.	Non-Metric Units in Metric Units.		Metric Units in Non-Metric Units.	
Austria .....	1 Maas	= 1·415 Litres .....	1 Litre	= 0·7067 M.
Baden .....	1 Maas	= 1·500 " .....	1 "	= 0·6667 M.
Bavaria .....	1 Maaskanne	= 1·069 " .....	1 "	= 0·9355 Msk.
Denmark ....	1 Potte	= 0·966 " .....	1 "	= 1·0352 P.
Great Britain.	1 Gallon	= 4·5404 " .....	1 "	= 0·2202 Gals.
Prussia .....	1 Quart	= 1·1448 " .....	1 "	= 0·8735 Qts.
Russia .....	1 Stof	= 1·5374 " .....	1 "	= 0·6505 St.
Saxony .....	1 Kanne	= 0·9365 " .....	1 "	= 1·0678 K.
Sweden .....	1 Kanna	= 2·6149 " .....	1 "	= 0·3824 K.
Switzerland..	1 Pot	= 1·5000 " .....	1 "	= 0·6667 P.
United States	1 Gallon	= 3·7852 " .....	1 "	= 0·2642 Gals.
Wurtemberg.	1 Maas	= 1·8371 " .....	1 "	= 0·5444 M.



IV. *Equivalents of Units of Dry Capacity.*

Country.	Non-Metric Units in Metric Units.		Metric Units in Non-Metric Units.	
Austria .....	1 Metze	= 61.494 Litres.....	1 Litre	= 0.01626 M.
Baden.....	1 Sester	= 15.000 " .....	1 "	= 0.06667 S.
Bavaria.....	1 Metze	= 37.059 " .....	1 "	= 0.02698 M.
Denmark ....	1 Skjæppe	= 17.392 " .....	1 "	= 0.05750 Sk.
Great Britain.	1 Bushel	= 36.323 " .....	1 "	= 0.02753 Bu.
Prussia .....	1 Scheffel	= 54.961 " .....	1 "	= 0.18190 Sch.
Russia.....	1 Tchetverik	= 25.336 " .....	1 "	= 0.03947 Tch.
Saxony .....	1 Scheffel	= 103.899 " .....	1 "	= 0.00962 Sch.
Sweden.....	1 Kubikfot	= 25.956 " .....	1 "	= 0.38526 Kf.
Switzerland..	1 Quarter	= 15.000 " .....	1 "	= 0.06667 Q.
United States	1 Bushel	= 35.238 " .....	1 "	= 0.02838 Bu.
Wurtemberg.	1 Simri	= 22.152 " .....	1 "	= 0.04514 S.

Measures of surface and solidity are in general derived from the measures of length, and need not be presented here. Agrarian measures concern local populations chiefly, and have not an important international interest. Wherever the metric system is introduced, the units of agrarian measure now in use will, in the course of time, be superseded; but it is not indispensable that they should be interfered with by legislation immediately.

*The metric system to be employed in negotiations and intercourse between governments.*

**510.** In all negotiations, treaties and diplomatic communications of every description, between the governments of different nations, in which it shall be necessary to express quantities by weight, or by measures of length, surface, capacity or solidity, the terms of the metric system shall be employed for the purposes of such expression.

*Customs duties to be levied by metric weight and measure, and postal tariffs to be regulated by metric weight.*

**511.** If, among the nations parties to this Code, there be any which shall continue to maintain their national and non-metric systems of weight and measure for purposes of domestic trade and business, such nations shall nevertheless allow and require customs duties to be levied in their ports of entry by metric weight and measure, and shall conform the tariffs of weights of

mailable matter in their post-offices to the denominations of metric weight.

*Standard units of length and of weight.*

**512.** The unit of length of the international metric system is declared to be the length, at the temperature of melting ice, of the platinum metre-bar deposited at the palace of the Archives in Paris on the 4th Messidor of the year VII. of the French Republic, by the international committee appointed to fix the length of the definitive metre, and still there preserved. The unit of weight of the same system is declared to be the weight of the platinum kilogramme deposited at the Archives on the same occasion, by the same committee.

*Copies of the standards to be made and carefully preserved, as standards of verification.*

**513.** The governments of the nations parties to this Code shall cause copies of the standard units of length and of weight to be constructed and accurately compared with the prototypes in the Archives at Paris, which copies shall be carefully kept in such secure place and in charge of such officers as the several governments may appoint, to be used at distant intervals of time for the verifications hereinafter described, and for no other purpose.

*Working standards, or standards for daily use, to be constructed and periodically verified.*

**514.** Copies of the prototype standard units shall be also constructed and accurately compared with the standards of verification provided for in the preceding article, which copies shall be used in the preparation of subordinate standards to be deposited in the principal towns, provinces or districts of each country, for the comparison and regulation of the weights and measures in immediate use among the people. These copies shall be preserved and used with extreme care; and at intervals of time to be fixed by law, they shall

be compared with the standards of verification, in order that any alteration which may have been occasioned by use may be detected and allowed for.

*Standard measures of capacity.*

**515.** The metric measures of capacity, being immediate derivatives of the linear measures, may be verified by the bulk in cubic centimetres, or the weight in milligrammes, of distilled water which they will hold at a certain temperature. The government of each nation shall establish a system of verification of such measures, with the advice of scientific and practical experts in metrology.

*Certain denominations not decimally related to the units of length, capacity, surface and weight, to be allowed.*

**516.** It shall be lawful to use, in ordinary transactions and descriptions, the following non-metrical denominations, with the values severally attached to them :

*Weights.*

- 1 ounce= $\frac{1}{16}$  kilogramme=50 grammes.
- 1 pound= $\frac{1}{2}$  kilogramme=500 grammes.
- 1 quintal=100 pounds=50 kilogrammes.
- 1 ton=2,000 pounds=1,000 kilogrammes.

*Measures of Length.*

- 1 foot=10 inches=30 centimetres=3 decimetres.
- 1 rod=5 metres.

*Itinerary Measure.*

- 1 mile=5,000 feet=1,500 metres=300 rods.

## TITLE XXII.

## LONGITUDE AND TIME.

The use of geographical co-ordinates, for the purpose of fixing the positions of places upon the earth's surface, was first suggested by Hipparchus.\* The method seems to have been first practically applied by Marinus, of Tyre, a geographer known to us only by the citations of his work in Ptolemy. Claudius Ptolemy, of Alexandria, who flourished toward the middle of the second century of our era, presented, in his treatise on geography, a pretty full synopsis of the knowledge of his time in regard to this subject, many of his pages consisting simply of dry details of the latitudes and longitudes of particular places. For latitudes, the equator furnishes a natural circle of reference. For longitudes, any meridian may serve as a zero; but in the early history of geographical science, it was thought advisable, and it then seemed possible, to choose such a prime meridian as should allow all longitudes to be measured in a common direction. In the time of Ptolemy, the limit of the habitable world toward the west was supposed to lie in the group of islands called the Fortunate Islands, now known as the Canaries. Through this group he accordingly supposed his first meridian to pass; but its position was apparently defined only by its presumed distance from Alexandria, so that the meridian of Alexandria must be regarded as his actual meridian of reference.

As, in the progress of centuries, geographical knowledge extended and new geographers arose, new meridians were adopted. In the construction of maps and charts, it was natural that authors should pass their meridians of reference through well-known places; as, for instance the capitals, or chief towns of their own countries. The progress of astronomy contributed moreover to the multiplication of meridians of reference, since convenience would suggest that the tables founded on actual observation should be conformed to the local time at the observatory.

During what are commonly called the dark ages in Europe, astronomy was cultivated chiefly by the Arabians,† whose tables, some of them, are said to have possessed much merit. The first European astronomical tables of importance were those which were prepared in the latter part of the thirteenth century, (published, however, only in 1843,) under the auspices of Alphonse X., King of Castile, and which are known by his name.‡ These were adapted to the meridian of Toledo. The tables of

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\* *Montucla, Histoire des Mathematiques*, T. I., P. I., L. 4; *Delambre Hist. Astr. Ancienne*, T. II., ch. 15.

† *Ency. Brit., Art. Astron.*

‡ *Montucla*, T. I., P. II., L. I.; *Id.*, T. IV., P. V., L. 7.

Copernicus, in the sixteenth century, were conformed to the meridian of Cracow. These were, somewhat later, improved and republished by Reinhold, under the name of the Prutenic or Prussian Tables. The Alphonsine, Copernican and Prutenic tables were all founded upon ancient and imperfect observations. They were followed by a variety of others, mostly deduced from them; but the whole of these were superseded, early in the seventeenth century, by the publication of the famous tables, called the Rudolphine Tables, in which were presented the results of the long and laborious observations of Tycho Brahe, reduced and arranged by the celebrated Kepler. The meridian of these tables was that of Uranibourg, Brahe's observatory, in the island of Huena. Simultaneously with these, and later, appeared the tables of Longomontanus, (1624,) and of Reinhart, (1630,) referred to the meridian of Copenhagen; of Lansberg, (1632,) referred to the meridian of Goes; of Reinert, (1639,) meridian of Pisa; of Goldmeyer, (1639,) meridian of Nuremberg; of Bullialdus, (1645,) meridian of Uranibourg; of John Newton, (1657,) meridian of London; of Count de Pagan, (1657,) meridian of Paris; of Street, (1661,) meridian of London; of Lever, (1660,) meridian of Rome; of Wing, (1669,) meridian of London; of De la Hire, (1687,) meridian of Paris; of Halley, (1749,) meridian of Greenwich; of Lacaille, (1758,) and of Lalande, (1759,) meridian of Paris; and many others.

Besides the general tables here referred to, there were published in many places, from a very early period, ephemerides of the movements of the principal heavenly bodies. Montucla\* enumerates fifty or more publications of this kind, referred to a variety of meridians, as Vienna, Ulm, Berlin, Nuremberg, Venice, Bologna, Augsburg, Rouen, Dantzic, Paris, London, etc. These publications were generally intended to cover a series of years, and were not periodical. Others, however, were issued annually, the earliest of which, computed for the meridian of Paris, appeared in Paris in 1678, under the name of the "*Connaissance des Temps*." This has since been uninterruptedly continued to the present time. A similar publication, which also still continues, was commenced in Berlin, in 1766, under the title of the "*Astronomisches Jahrbuch*." Another annual of the same character appeared in Vienna, in 1757, and still another, in Milan, in 1775. The annual ephemeris, however, which has had the widest circulation, and has most largely contributed to the uses of navigation, has been the "British Nautical Almanac," which made its first appearance in 1767, under the editorial auspices of the celebrated Maskelyne. This is computed for the meridian of the Royal Observatory, at Greenwich. Since about the year 1850, there has been also published an American work of similar character, under the name of the "American Nautical Almanac."

In so far as the diversity of the meridians employed in tables, ephemerides, maps and charts, affects only the convenience of astronomers or scientific geographers, it is a matter of comparatively small importance. In practical navigation, the case is very different. To the navigator, sim-

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\* *Montucla*, T. IV., P. V., L. 7.

plicity is of the highest importance; not only because computations at sea should be unembarrassed by any unnecessary multiplication of figures, but because diversity in the expression of the positions of the places on the earth's surface, tends to confusion of thought and to possible error. Notwithstanding this, there has hitherto been no successful attempt to establish uniformity in the construction of nautical charts and tables. It is possibly true that the introduction of astronomical ephemerides into navigation has tended on the other hand rather to promote diversity than to favor uniformity. Until after the discovery of America, geographers seem uniformly to have followed Ptolemy in placing the first meridian among the Canaries. And though the Alphonsine Tables referred astronomical time to the meridian of Toledo, yet the same work contained a list of geographical latitudes referred to the original Ptolemaic first meridian.

About the close of the fifteenth century, a great impulse was given to ocean navigation by the discovery of the western continent; and in consequence of the establishment by Pope Alexander VI., in 1494, of the famous line of demarcation between the Spanish and the Portuguese—an imaginary line drawn three hundred and seventy leagues westward from the Azores, the geographers and hydrographers of those nations began to adopt the meridian of these islands as the first meridian of their charts. This is seen in the maps of Juan de la Cosa, given by Von Humboldt, in his *Examen Critique*—maps constructed about the close of the fifteenth century, and dated A. D. 1500. But the exact position of this meridian was not determined by local observation. It seems rather to have been deduced by an approximate computation or estimate of its distance west from Lisbon or Cadiz. In progress of time, the English began to use the meridian of London, and later, of Greenwich, and the French, that of Paris; while the Dutch, by the advice of their distinguished countryman, Simon Stevin, commenced, about 1600, referring their nautical longitudes to the Peak of Teneriffe.

During the sixteenth century, also, Gerhard Kauffmann, (Mercator,) the author of the projection which bears his name, and which has been found practically so valuable, placed the first meridian of his charts in the island, Del Corvo, the northernmost and smallest of the Azores, for the reason assigned that the magnetic line of no variation passed at that time through it.

The confusion arising out of so great a variety of usages began at length to be felt as a serious evil. Cardinal Richelieu, the enlightened minister of Louis XIII., in the early part of the seventeenth century, resolved to make an effort to bring about a better state of things. He accordingly invited a congress of astronomers and mathematicians to assemble at Paris, in the spring of 1630, to agree, if possible, upon a common meridian. As a result of this conference, the island of Ferro, the most southwesterly of the Canaries, was fixed upon; and a royal order establishing this decision was promulgated in July of the same year.\* Unfor-

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\* *Gehler's Physickalisches Worterbuch. Band VI., 1.*

tunately, however, the exact longitude of Ferro, with reference to any point of the continent of Europe, was at that time unknown. The determination of its position was never made by authority; and at length, in 1724, it was resolved to assume it at  $20^{\circ}$  West from Paris. Borda and Pingré give the longitudes of the easternmost and westernmost points as  $20^{\circ} 17'$  and  $20^{\circ} 30'$ . To name the island, therefore, without naming a specific point in it, was to leave the meridian still unfixed, even had its general position been better known. At any rate, this effort to establish uniformity was productive of no practical result.

The absence of any recognized law, or any uniformity of usage on this subject, among navigators, still continuing toward the end of the seventeenth century, is illustrated by the following passages from the work entitled "*L'Art Naviger*," by Father Dechaies, a work mentioned favorably by Montucla, (T. I., p. 658,) for its precision and clearness, and which was published in 1677:

"Les Astronomes," says Duchales, "prennent ordinairement pour premier meridien celui du lieu ou ils font leur demaire, et les Pilotes le Meridien du lieu d'ou ils partent.

"Les Anciens Geographes n'ont pas deu prendre pour premier Meridien celui des dernieres terres vers l'Orient; parcequ'ils n'estoient pas arrivez jusques au bout de ce cote-la; qu'a cause la longitude dans le Ciel, se comptant de l'Occident a l'Orient; cella de la terre se devoit prendre du mesme cote. Il estoit donc a propos de le placer dans les terres les plus Occidentales. Quelques-uns des Modernes le mettent aux Isles Fortunées, ou a l'Isle de Fer, la plus Occidentale des Canaries. Les autres aux isles du Cap Nord, comme a celle de Saint Nicholas. Mais cette diversité d'opinions est de peu d'importance; puisque nous pourrions toujours prendre pour le premiere Meridien de nostre Navigation celui des derniers terres qui nous avons veus, ou le premier Meridien de la carte de laquelle nous nous servent."

Since the perfection of the methods of determining longitudes by lunar observations, and by chronometers, navigators have naturally referred their longitudes to the meridians for which the ephemerides of the sun and moon are computed. Of the nautical ephemerides now published, the English Nautical Almanac, the American Nautical Almanac, and the *Connaissance de Temps* are most used. But the American work employs, for all those determinations which concern navigation, the meridian of Greenwich; so that if, in the selection of a meridian to be recommended to the acceptance of all the world, we are to limit ourselves to a choice between the meridians already in use, we can not hesitate to give the preference to Greenwich as involving the inconvenience of change to the smallest number.

It may be objected that the place of Greenwich on the earth is marked by no great and distinctive physical feature. A feeling that the place of the first meridian should be so distinguished, though it has been always more or less prevalent, has no substantial foundation, either as it respects the usefulness of such a meridian, or the facility of its determination. That an island like Del Corvo is small and isolated, or that a peak like

Teneriffe is prominent and conspicuous, might seem, at first thought, to add something to the claim of such a point to be taken as the origin of longitudes. But to the astronomical observer these circumstances are of no importance. The meridian of his observatory is marked for him by a simple trace ; and this in general drawn upon the surface of an artificial monument. In the selection of a common meridian for the world, there is nothing, therefore, to restrict the most perfect freedom of choice, so far at least as the mere configuration of the earth's surface is concerned.

On the other hand, it is in favor of the adoption of some meridian already largely in use, that there are in existence many laboriously prepared tables necessary to the computation of nautical ephemerides, constructed with reference to such meridians, all of which will have to be transformed, if a new meridian is adopted. This circumstance, and the additional one that Greenwich is familiar to a larger number of navigators than any other meridian of reference, must be regarded as decisive in favor of that as a common first meridian, unless such a selection should be found to be attended with some countervailing disadvantage thus far overlooked. If such a disadvantage exists, it must spring from the connection of longitude with time.

The natural day begins at any place at the rising of the sun ; and as the sun is always rising somewhere, the day is always somewhere beginning. The "day of the month" expresses the number of times the sun has risen within the month, up to that day, inclusive. If a given day of any month, say the first of January, begins at sunrise at a given place the same day of the month will begin sooner in absolute time at places east, and later in absolute time at places west. The difference is one hour for every fifteen degrees of longitude, or twelve hours for half the circumference of the sphere. If, therefore, we suppose the first of January to begin for all places east of the assumed place at the sunrise next preceding in absolute time the sunrise of the same day at this assumed place, and for all places west of the assumed place, at the sunrise next following the same sunrise, we shall, by pushing the computation half a circle both ways, arrive at the conclusion that, in longitude one hundred and eighty degrees from the starting point, the first of January begins both twelve hours earlier and twelve hours later than the beginning of the same day at that point. This later beginning must be counted the second, if the earlier was the first ; but the same consequence will not follow if the earlier was counted as the thirty-first of December. In this latter case, the count must be supposed to be changed, from the thirty-first of December to the first of January, somewhere east of the given place, but not so far east as one hundred and eighty degrees. It is then evident that, if there is to be any uniformity in the regulation of the calendar of the month, and any exactness in chronological determinations, some meridian must be agreed upon at which the change of count in the monthly calendar shall begin. Such a meridian will involve to those who live near it the inconvenience that the same natural day will count a unit more in the month to those who live west of it, than to those who live east, though the actual distance between them may be insignificant. And



on this account it is desirable that the meridian thus selected to mark the beginning of the day should lie as far as possible in the open ocean.

Now it happens that the meridian opposite to Greenwich fulfills this condition almost as nearly as any which can be selected. It crosses no portion of any continent except the extremity of Northeastern Siberia—an inhospitable region, now peopled by savages, and incapable of ever becoming an important portion of the civilized world. Its course, then, lies among the petty islands of the great South sea; and it merely touches the eastern angle of New Zealand, the only habitable land of importance which it approaches. This meridian seems, therefore, to be very favorably situated to serve the purpose of dividing the days of the calendar. The meridian opposed to Hamburg, or Altona, might possibly be a little more so, since it passes through Behring's Straits, nearly clearing both continents; and it leaves a larger portion of the Pacific islands to the west. Practically, however, the claims are nearly balanced, and the advantages which Greenwich possesses in other respects have been pointed out above.

Though the natural day begins at sunrise, the astronomical day begins at the passage of the mean sun over the meridian of the place; and the civil day begins twelve hours earlier, or at the inferior culmination immediately preceding. Taking the meridian of Greenwich, therefore, as the first meridian of longitude, it becomes the regulator of time; so that when the sun passes the Greenwich meridian on a given day, the same day is twelve hours advanced on the west side of the meridian opposite, but has not yet begun, and will not begin for twelve hours more, on the east side of the same meridian. This explains the provisions of the Code defining the day.

ARTICLE 517. The meridian of Greenwich to be the prime meridian.

518. Maps, charts, nautical tables, &c., how to be prepared.

519. Public vessels to be furnished with tables and charts conforming to the meridian of Greenwich, and required to keep their logs in accordance therewith.

520. The Gregorian style of reckoning to be employed.

521. Of the length of the year, and of leap years.

522. The term "year," in contracts and written instruments, how to be understood.

523. Divisions of the year.

524. The day defined.

*The meridian of Greenwich to be the prime meridian.*

517. In the determination of positions upon the earth's surface, by co-ordinates of latitude and longitude, the meridian passing through the observatory at

Greenwich, England, shall be taken as the prime meridian ; and longitudes shall be reckoned from that, eastwardly and westwardly, one hundred and eighty degrees, to the meridian opposite, or three hundred and sixty degrees, to the same meridian again. And in all legislative, executive and judicial acts, and in public records of every description, in which the positions of places are defined, or limits designated, or boundaries fixed, by means of co-ordinates of latitude and longitude, the longitudes stated shall be the longitudes east or west from the meridian of Greenwich ; and when longitudes are given in such documents without specification of the meridian from which they are measured, they shall be understood to be longitudes east or west from the meridian of Greenwich.

*Maps, charts, nautical tables, &c., how to be prepared.*

**518.** All maps, charts, nautical and astronomical tables, and other publications designed for the use of navigators, which may be prepared and put into circulation by authority of the government of any nation, shall be conformed, as it respects the reckoning of longitude, to the provisions of the last article.

*Public vessels to be furnished with tables and charts conformed to the meridian of Greenwich, and required to keep their logs in accordance therewith.*

**519.** All sea-going vessels employed, in any capacity, in the service of any nation, shall be furnished with charts, tables, and such other aids to navigation as may be necessary, prepared as required in article 518 ; and the commanders of all such vessels shall be required, in keeping their logs, to state all their longitudes, determined by observation or computation, according to the values of the same as referred to the meridian of Greenwich.

*The Gregorian style of reckoning to be employed.*

**520.** Time shall be computed according to the Gregorian style of reckoning now prevalent in Western Europe and in America, according to which the current year is the one thousand eight hundred and seventy-first since the epoch ; and the first day of January of every year hereafter shall be taken to be the first day of the year.

*Of the length of the year, and of leap years.*

**521.** Every year consists of three hundred and sixty-five days, except those whose numerical designations are exactly divisible by four, without remainder, which years consist each of three hundred and sixty-six days ; except that, of the centurial years, or the final years of the successive centuries, only those as to which the number of the centuries completed is divisible by four, consist of three hundred and sixty-six days ; and the other centurial years consist of three hundred and sixty-five days only.

The length of the tropical year is nearly three hundred and sixty-five days and a quarter, but falls short of this value by a fraction equal to 11'232426 minutes. Julius Cæsar, in his reformation of the calendar, which took place forty-six years before the Christian era, disregarded this minute quantity, and treated the year as being equal to three hundred and sixty-five and a quarter days exactly. Each common civil year being thus a quarter of a day too short, the intercalation of an entire day, or four quarters of a day, at the end of every fourth year, was presumed to maintain, with sufficient accuracy and permanence, the adjustment of the equinoxes and solstices to the places which they originally occupied in the calendar.

The error of the Julian year produces no very perceptible effect, when a limited period only of years is considered ; but the same is not true when the period extends to several centuries. Eleven minutes are 11-1440ths of a day. In four hundred years this becomes 4400-1440ths of a day, which is equal to three days and one-eighteenth of a day. Or, if we use the more exact figures, given above, the error of the Julian year, multiplied by four hundred, amounts to three days and twelve one-hundredths of a day. The Julian intercalation of one day in four years, therefore, displaces the equinoxes in the calendar by more than three days in four centuries.

At the time of the assembling of the Council of Nicæa, A. D. 325, the vernal equinox fell upon the twenty-first day of March. Toward the close of the sixteenth century, it was observed to fall on the eleventh.

In the year 1582, Pope Gregory XIII. published the calendar which is known by his name ; in which, by adding ten to the count of every day in every month, from the fourth day of October, in that year, inclusive, onward, he restored the equinox to the place it occupied in the calendar in the year 325. This was a piece of reformation uncalled for in any interest either ecclesiastical or secular, and it had the effect of preventing, for a long time, the acceptance of his style of reckoning, and what is of more importance, of his rules for maintaining the adjustment of the calendar months to the seasons, by the Protestant nations of Europe, and by those adhering to the church of the East. These rules constitute a truly valuable improvement, and their simplicity, no less than their importance, would have secured for them universal favor and adoption at a very early period, in spite of the jealousies which were sure to be awakened by anything proceeding from Rome which should bear the appearance or an attempt to dictate to the world, had they not been accompanied by the large and unnecessary change above mentioned, in the absolute reckoning of the day.

As things actually fell out, the Italian States (mostly), with Spain and Portugal, adopted the Gregorian calendar from the day (October 4, 1582) named for its commencement, in the Papal Bull. France adopted it two months later, calling the day following the ninth of December, the twentieth, and so onward. In the same year, the matter was discussed at Augsburg, in the Diet of the German Empire ; and the Catholic States of Germany adopted the new calendar in the year following.\* The Protestant States, however, clung to the old calendar ; and the consequence was that in parts of the country where the population was generally mixed, there arose a good deal of confusion and discord. This state of things continued for more than a century ; but at last the Protestants gave way, and, in the year 1700, the new calendar was introduced throughout all Germany, the day following the eighteenth of February being called the first of March. At the same time, the new calendar was adopted in Denmark and in Holland ; and in 1701, it was adopted also in the Protestant Cantons of Switzerland, the day following the thirty-first of December being called the twelfth of January. The increase in count was now eleven days, instead of ten, because the centurial year 1700 had not been reckoned a leap year under the Gregorian system. England accepted the new calendar in 1752, the day following the second of September in that year being called the fourteenth. In the following year, Sweden did the same, calling the day after the twenty-eighth of February the twelfth of March.

The Julian calendar now continues to be maintained only by Russia, and the adherents of the Greek church generally. Since there is no longer any possibility of securing uniformity of practice in the reckoning of time, but by universal acquiescence in the Gregorian calendar, it is greatly to be hoped that the enlightened government of the Russian Empire will not long delay the introduction of the desired change among their people.

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\* *Bond's Handy Book of Dates*, pp. 18, 19.

*The term "year," in contracts and written instruments, how to be understood.*

**522.** Whenever the term "year" or "years" is used in any statute, deed, contract, verbal or written, or in any public or private instrument whatever, the year intended shall be understood to consist of three hundred and sixty-five days; the half year of one hundred and eighty-two days; and the quarter of a year of ninety-one days; and if within the limits of any period so computed the added day of leap year shall fall, such added day shall not be counted as enlarging the number of days of that period.

*Division of the year.*

**523.** The year shall continue to be divided, as at present, into twelve months, which months shall retain the names by which they are at present known, and each month shall consist of the same number of days as are assigned to it in the calendars now in use among all Christian nations, viz :

January, . . . 31 days.	June, . . . 30 days.
February, . . . 28 "	July, . . . 31 "
in common yrs.,	August, . . . 31 "
or, in leap yrs., 29 "	September, . . . 30 "
March, . . . 31 "	October, . . . 31 "
April, . . . 30 "	November, . . . 30 "
May, . . . 31 "	December, . . . 31 "

And whenever the term "month" shall be used in any statute, deed, contract verbal or written, or in any public or private instrument whatever, this term shall be construed to mean a calendar month, in accordance with the foregoing scheme.

In the reformed calendar of Julius Cæsar, as originally constructed, the months were made to consist of thirty-one days and thirty days alternately, beginning with March.\* As the common year consists of but three hundred and sixty-five days, the final month of the year, on this plan, falls a day short of thirty days in common years, and contains fully thirty only in leap years. Had the alternation been inverted, making the first month to consist of thirty days, and the second, of thirty-one, and

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\* *Encycl. Brit., Art. Calendar.*

so on, no month would ever have fallen short of thirty days, or have exceeded thirty-one.

The name of Julius was given to the month Quintilis, in honor of the great reformer. Augustus afterwards gave his name also to the month Sextilis ; and the Roman Senate, in a spirit of contemptible sycophancy, stole a day from February, already too short, to add to August, that the month named after the reigning Emperor might not be a less important one than that which had received its name from his illustrious predecessor.

The distribution of the days of the year among the months is, therefore, at present entirely anomalous. Moreover, the introduction of the intercalary day of leap year at the end of the second month of the year, rather than at the end of the year itself, is a source of considerable inconvenience, especially in connection with the calendar of the church. The following scheme for the better distribution of the days of the year among the months, and the transfer of the quadrennial intercalation to the close of the year is, therefore, presented as worthy of consideration.

The year to be divided into sextiles, each of two months. Each sextile to be made up of a first month, of thirty days, and a second month of thirty-one days ; with the exception of the last sextile, in which the second month has only thirty days in common years, and thirty-one days in leap years, as follows:

<i>First Sextile</i>	{ January.....30 days.	<i>Fourth Sextile.</i>	{ July ... .....30 days.
	{ February.... ..31 "		{ August.....31 "
<i>Second "</i>	{ March.....30 "	<i>Fifth "</i>	{ September.....30 "
	{ April.....31 "		{ October.....31 "
<i>Third "</i>	{ May.....30 "	<i>Sixth "</i>	{ November.....30 "
	{ June... .....31 "		{ December.....30 "
			{ Or, in leap year 31 "

### *The day defined.*

**524.** In order to prevent confusion of dates, in consequence of differences of local times, it is to be understood :

First, that the civil day shall begin, at each place, twelve hours of mean solar time before the passage of the mean sun over the meridian at that place, and shall end twelve hours of mean solar time after such meridian passage.

Secondly, that, at the moment of mean solar meridian passage at Greenwich on the first day of January, the day shall be accounted the first day of January throughout the world ; it being noon at that moment in the meridian of Greenwich, afternoon throughout all the one hundred and eighty degrees of longitude eastward from Greenwich, and before noon throughout all the one hundred and eighty degrees of

longitude westward from Greenwich; and the same shall be true for every other day of the year; that is to say, the moment of mean solar meridian passage at Greenwich shall be that in which the day is of the same name throughout the world, whatever may be the degree of advancement of the day, by local time, in different longitudes.

So long as the entire extent of the known world scarcely exceeded in longitude a third part of the earth's circumference, there was no danger that an error of a day could be committed in assigning the date of an event. Nor was the possibility of such an error considerable even after the route to the Indies had been discovered by the way of the Cape of Good Hope. But when the opposite route, by Cape Horn, had been successfully explored, and the Spanish navigators, who had followed this course, met the Portugese, who had come the other way, in the Philippine Islands, it was found that they differed in their reckonings of time by an entire day.

So long, however, as the enlightenment of the world was mainly concentrated in Europe, or extended on the western continent but little beyond the Atlantic coast, the possibilities of confusion in chronology, for want of a universally received definition of the beginning and ending of the calendar day, were not great. The case is quite different at present, when the great islands of Australia are occupied by flourishing British colonies, and both shores of North America are peopled by an enterprising race, engaged in prosecuting extensive commercial enterprises in both hemispheres. It is becoming, therefore, a matter of greater importance every day, that there should be established some universal rule for defining the calendar day for all the world. The reasons why the meridian of Greenwich should be fixed upon, rather than any other, for the purposes of this definition, have been already assigned in the Article relating to longitude.

## TITLE XXIII.

## SEA SIGNALS.

**ARTICLE 525.** A signal code to be devised by an international committee.

526. The use of the international signal code to be enjoined upon all ships, for all communications by signal, except such as may be of a confidential nature.

527. Apparatus and printed instructions required for the use of the international signal code, to be provided.

*A signal code to be devised by an international committee.*

525. Within one year after the adoption of this Code, there shall be appointed a joint commission of competent persons, to fix upon a common system of signals to be used for purposes of communication between vessels at sea ; such commission to consist of three members from each nation.

*The use of the international signal code to be enjoined upon all ships, for all communications by signal, except such as may be of a confidential nature.*

526. The signal system, fixed upon as provided in the last article, shall be used in all sea-going ships, public or private, bearing the national character of any of the nations parties to this Code, for all signal communications, except those which it may be necessary, in the public interest, to transmit confidentially.

*Apparatus and printed instructions required for the use of the international signal code, to be provided.*

527. Every sea-going ship, public or private, bearing the national character of any of the nations parties to this Code, must, before going to sea, be furnished with



all the apparatus necessary to be used, in the employment of the international signal code, for communications at sea ; and also with full and complete printed instructions for the use of the same.

All signal codes, whether for sea service or for land service, rest upon the same fundamental principles. A signal is a demonstration of some kind, having a conventional significancy, and designed to assist in conveying ideas from one person to another. Where distance intervenes between the persons communicating, the signals must be addressed to the eye or to the ear. In either case, a distinction may be made between signals which are momentary or evanescent, and such as may be made permanent for any length of time, at will.

To the class of evanescent signals belong most of those which depend on motion. Some such may be seen in common life, in universal use ; as, for instance, beckoning with the hand, nodding or shaking the head, &c. : and, in systematic signal codes, the waving of flags, the flight of rockets, and the report of fire-arms, possess the same character. Permanent, or more properly, lasting signals are such as remain unchanged to perception during a sensible period of time, which may be protracted at the pleasure of the exhibitor. Examples of these are hoists of flags, or prolonged blasts of steam-whistles or fog-trumpets, or attitudes assumed by the person himself who gives the signal.

The simple motions, sounds or displays employed in signal codes, are called elementary signals. The number of these is, in the nature of things, limited. No code of any comprehensiveness could be formed consisting of uncombined elementary signals only. A few elements will, however, form a very large variety, when they are associated together in groups. Groups of this kind are called combination signals. Such groups may be constructed in several modes ; as, first, by *combination proper*, where, from a given number of elements, say six, there are formed assemblages of a smaller number, as of threes, of which no two shall be alike in all their elements ; secondly, by *permutation*, where the same combination is made to furnish as many signals as there are different orders of succession in which its elements can be disposed ; and thirdly, by *arrangement*, in which a very small number of elements may be made to furnish a very large number of signals, by repeating one or more of the elements several times in the same signal, and differently disposing the elements among themselves. (*Myer's Manual of Signals.*)

It may be said, generally, that it is not desirable to employ a large number of elementary signals in a signal code ; also, that the principle of *arrangement* applied to a few elements will furnish more satisfactory results than permutation and combination only, applied to a larger number.

Codes of signals may be formed to signify letters, in which case communications may be made in any form of words, as by telegraph ; or to signify numbers, which may then be employed to designate messages previously prepared, and inserted in their order in a dictionary. The ad-

vantage of the first system is, that it leaves communication entirely free ; and that of the second, that it economizes time, by conveying many words through a single number. A complete system should embrace both methods ; the second, for that numerous class of communications the necessity of which is of frequent recurrence ; and the first, for communications the nature of which cannot be anticipated.

The dot and line telegraphic alphabet illustrates the advantages of limiting the number of elementary signals employed in any system. By the principle of arrangement, two characters, or, at most, three, (a long line, a short one, and a dot,) suffice, in that instance, for the construction of an entire alphabet of signals, perfectly distinct from each other, and easily fixed in the memory. This alphabet, in itself, would form an amply sufficient signal code to enable two vessels at sea to communicate with each other, by means of steam-whistles, or by the more or less prolonged exposure and concealment of any visible object.

There are already in use certain signal codes, which have obtained something approaching to an international character. One of these is "The Universal Code," of the late Capt. Marryatt, of the British Royal Navy ; another, "The Code International," of Capt. Reynold, of Paris ; and a third, "The Commercial Code," of the British Board of Trade. The first and second of these use *signal numbers*, as ciphers of signal communication ; while the third, or Commercial Code, uses *signal letters*, permuted in sets of two, three, and four each for the same purpose (*Myer's Manual of Signals*, p. 51). The code itself consists of words and sentences, classified according to subjects. Signals are shown by the required hoist of flags, each flag being the recognized symbol of a particular letter. This method originated in 1856, and (as above stated) under the auspices of the British Board of Trade ; since which time, it has been gradually introduced into the war and merchant marine of the principal maritime nations of Europe. As yet, however, it is but partially used in the naval or commercial marine of the United States, although, by a general order of the Navy Department, the code has been issued to all the vessels of the United States Navy, together with the necessary signal flags.

The system of signals which seems to possess the largest capabilities of usefulness is that which is known by the name of the "Chronosemic Method" of signalling, invented by Benjamin Franklin Greene, Chief Clerk of the Bureau of Navigation, of the Navy Department of the United States. This system consists in employing measured intervals of time as the significant symbols, and using audible or visible signals for the purpose only of marking the beginnings and endings of these intervals. Any convenient small interval of time—say one, or three, or five seconds—may be taken as the unit interval ; then this interval doubled, tripled, quadrupled, and so on, will give the successive additional symbols necessary to form the code.

This system possesses several advantages. It permits the use of the largest variety of signal apparatus ; since it is a matter of entire indifference by what means the beginning and ending of each interval is marked,

so that the indication is distinct. Thus, for visible signals, by day, the exhibition and concealment, or the simple waving, of a flag; or the substitution for the flag of any brilliant or conspicuous object; or even, at small distances, a gesture of the arm of the signal officer; or, by night, the flashing of gunpowder, the ascent of a rocket, or the display and eclipse of a signal lantern; and in time of fog, the firing of ship's guns, the blowing of a steam whistle, or the sounding of a trumpet or bugle, may be resorted to equally and interchangeably, as convenience may suggest. It admits, in the second place, of a very large extension of the circle of available signal distance beyond the practical limit which at present exists; making it possible, for instance, by means of rockets or guns, to convey messages between vessels separated by ten, fifteen, or even twenty or more miles. To these advantages it may be added, that the chronosemic method, from the simplicity of sign-making apparatus which it allows, involves a smaller necessary expenditure than any other; while, for fog-signals especially, it has been found greatly more effective than any plan heretofore devised.

For these reasons, it should seem to be desirable that, in any system of sea-signals designed for international use, the chronosemic method, if not adopted to the exclusion of every other, should have an important place. It is better, nevertheless, that the details of the system should be arranged by men of experience, whose practical acquaintance with the merits of different methods entitles them to speak upon the subject with authority, rather than that they should be fixed by arbitrary legislation. This consideration has suggested the provisions of the text above, which leave the precise form of the international signal code to be settled by a committee of experts.

The foregoing remarks apply to signal-systems designed for general or extended communication. Alarm-signals, of which the object is to prevent collisions, or to give warning of danger, may be much more simple; but in order that they may be in the highest degree effectual in securing the safety of vessels at sea, it is important that they should be everywhere the same. In the United States, the Board of Supervising Inspectors of Steamboats have adopted the following rules for fog-horn signals:

“Whenever there is a fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded at least every two minutes, viz.: steamships, and all other steamers, coasting and river, under way, shall use a steam-whistle; sailing and all other craft propelled by sails, under way, shall use a fog-horn, or equivalent signal; sailing ships, and every other craft propelled by sails, upon the ocean or lakes, shall, when on her starboard tack, blow one blast of her fog-horn, and when on her port tack, she shall blow two blasts of her fog-horn, at all times, at intervals of not more than two minutes; when hove to, she shall blow a general alarm; when at anchor, she shall blow her fog-horn, as at other times, at intervals of not more than two minutes. It shall at all times be the duty of steamers to give to the sailing vessel, or other craft propelled by sails, every advantage, and keep out of her way.

Steamships and sailing vessels, when not under way, or which shall be anchored or moored in or near the channel or fairway, as aforesaid, and not in any port, shall sound the fog-horn, at intervals of not more than two minutes ; and all steamers navigating in a fog or thick weather shall sound their steam whistle at intervals of not more than one minute. Sailing vessels shall at all times, on the approach of any steamer during the night time, show a lighted torch upon that point or quarter to which such steamer shall be approaching ; and upon any craft navigating rivers without being in tow of a steamer, such as rafts, flat boats, wood boats, and other like craft, shall sound a fog-horn, at intervals of not more than two minutes ; and all steamers navigating rivers in fog or thick weather, shall sound their steam-whistles, at intervals of not more than one minute."

## PART IV.

PROVISIONS FOR THE PRESERVATION OF  
PEACE.

- ARTICLE 528. Limit of permanent military force.  
529. Equipments, and military reserves.  
530. "Time of peace" defined.  
531. When militia may be called out.  
532. Notice of dissatisfaction, and claim of redress.  
533. Answer to be given.  
534. Joint High Commission.  
535. High Tribunal of Arbitration.  
536. Each nation bound by Tribunal of Arbitration  
537. Nations violating provisions to be resisted by all.  
538. Annual conference of representatives of nations.  
538a. Neutrality of inter-oceanic canal.

*Limit of permanent military force.*

**528.** In time of peace, the number of persons employed at any time in the military service of a nation, whether intended for land or sea, shall not exceed one for every thousand inhabitants.

The military establishment of Europe, during peace, has in round numbers, 3,000,000 of men, and when placed on a war footing, it swells to 5,000,000. These men are all withdrawn from industrial pursuits, where they could contribute to the comfort and wealth of mankind. Their support requires the labors of as many more; so that it may be set down, that the standing armies of that continent impose upon the nations burdens equal to the labors of from 6,000,000 to 10,000,000 of able-bodied men. The whole population of that quarter of the world is 240,000,000, of which it is computed that one in five is able to do the full day's work of a man: that is, 48,000,000 in all. Therefore, one eighth at least of the flower of Europe is set aside in peace to make ready for war. This is an unnecessary waste of force. No nation is benefited by it; all are burdened. The burden can be taken off, by common consent. The only point to be considered is the minimum to which the force can be reduced.

A large standing army is not only the enormous burden that it has been described, but it is a provocative to war. The arming of a nation should be looked upon very much as the arming of individuals. A man may keep arms in his house, to be used on occasions, but if he walks

abroad, always armed to the teeth, he speedily gets into a quarrel. So with a nation. The peace of society would certainly be endangered by the general practice of wearing arms. It was once so. And since social manners have been benefited by a general disarmament of individuals, it should seem that, for a similar reason, national manners would be benefited by a like process.

Examples of partial national disarmament are not wanting. The treaty between the United States and Great Britain, made at the close of the last war between them, stipulated that neither should keep ships of war upon the great lakes that divide them. The treaty of Paris, which closed the Crimean war, provided for the disarmament of Russia, in the Black sea.

The object of a military establishment is security, internal and external. The standing army of the United States is 30,000, giving one soldier to every thirteen hundred inhabitants. Yet these 30,000 men are scattered over a territory larger than that of any European State, and they have to keep watch of numerous Indian tribes, and to garrison many fortresses; a greater number probably in proportion to the population than those of any other nation in the world. It is true, that this country has no dangerous neighbors; but if a general disarmament should be adopted, the most powerful European State would hardly be a dangerous neighbor to the weakest. For the purpose of internal security, one armed guardian of the peace to every thousand persons should seem to be sufficient, acting in conjunction with the militia, which should chiefly be relied on for security against internal commotion.

The building and arming of fortresses could scarcely be regarded with apprehension, inasmuch as they are defensive. Ships do not, it is true, fall within the same category, for they may be regarded as movable fortresses, but they are limited in their operations. To bind a nation not to build them and lay them up, should not be considered essential to the security of states.

Militia should be regarded as the strong arm of nations, both for internal peace and external defense. For the support of the civil powers, in the execution of the laws, no other force is so natural and proper. It is cheap, ready and efficient. For national defense against external attack, it may, upon emergency, be converted into formidable armies. The last war between France and Prussia has shown how powerful a force a citizen soldiery may be made. In France, the national guard has on many occasions been the defender of order. In the United States, the militia has not only supported the civil power in executing the laws, but it has formed the nucleus of an army of volunteers of the most effective kind.

### *Equipments and military reserves.*

529. The last article shall not prevent a nation from building and arming, in its discretion, fortresses and ships of war, or from organizing, arming, and, for not more than one month in each year, drilling all or any

portion of its able-bodied men between twenty and forty years of age, as a force of militia, to be called into active service, according to article 531.

*“Time of peace” defined.*

**530.** By the “time of peace,” mentioned in article 528, is to be understood that period during which Austria, France, Great Britain, Germany, Italy, Russia, Spain and the United States are at peace with each other.

*When militia may be called out.*

**531.** Any nation may call its militia into active service to enforce its laws, suppress insurrections against its authority, repel invasions of its territory or execute article 537 of this Code.

See *Constitution of the United States*, Art. I., Sec. 8, Subd. 14.

*Notice of dissatisfaction, and claim of redress.*

**532.** If any disagreement, or cause of complaint, arise between nations, the one aggrieved must give formal notice thereof to the other, specifying in detail the cause of complaint, and the redress which it seeks.

*Answer to be given.*

**533.** Every nation, which receives from another, notice of any dissatisfaction, or cause of complaint, whether arising out of a supposed breach of this Code, or otherwise, must, within three months thereafter, give a full and explicit answer thereto.

*Joint High Commission.*

**534.** Whenever a nation complaining of another and the nation complained of do not otherwise agree between themselves, they shall each appoint five members of a Joint High Commission, who shall meet together, discuss the differences, and endeavor to reconcile them, and within six months after their appointment, shall report the result to the nations appointing them respectively.

*High Tribunal of Arbitration.*

**535.** Whenever a Joint High Commission, appointed by nations to reconcile their differences, shall fail to agree, or the nations appointing them shall fail to ratify their acts, those nations shall within twelve months after the appointment of the Joint High Commission, give notice of such failure to the other parties to this Code, and there shall then be formed a High Tribunal of Arbitration, in manner following: Each nation receiving the notice shall, within three months thereafter, transmit to the nations in controversy the names of four persons, and from the list of such persons the nations in controversy shall alternately, in the alphabetical order of their own names, as indicated in article 16, reject one after another, until the number is reduced to seven, which seven shall constitute the tribunal.

The tribunal thus constituted shall by writing signed by the members, or a majority of them, appoint a time and place of meeting, and give notice thereof to the parties in controversy; and at such time and place, or at other times and places to which an adjournment may be had, it shall hear the parties, and decide between them, and the decision shall be final and conclusive. If any nation receiving the notice fail to transmit the names of four persons within the time prescribed, the parties in controversy shall name each two in their places; and if either of the parties fail to signify its rejection of a name from the list, within one month after a request from the other to do so, the other may reject for it; and if any of the persons selected to constitute the tribunal shall die, or fail for any cause to serve, the vacancy shall be filled by the nation which originally named the person whose place is to be filled.

*Each nation bound by Tribunal of Arbitration.*

**536.** Every nation, party to this Code, binds itself to unite in forming a Joint High Commission, and a High Tribunal of Arbitration, in the cases hereinbefore



specified as proper for its action, and to submit to the decision of a High Tribunal of Arbitration, constituted and proceeding in conformity to article 535.

*Nations violating provisions to be resisted by all.*

**537.** If any party hereto shall begin a war in violation of the provisions of this Code for the preservation of peace, the other parties bind themselves to resist the offending nation by force.

*Annual conference of representatives of nations.*

**538.** A conference of representatives of the nations, parties hereto, shall be held every year, beginning on the first of January, at the capital of each in rotation, and in the order mentioned in article 16, for the purpose of discussing the provisions of this Code, and their amendment, averting war, facilitating intercourse, and preserving peace.

War, in all its aspects, has little to recommend it, and almost everything to condemn it. Even the brilliant qualities of courage and self-sacrifice, which it often calls forth, are more than counterbalanced by the cruelty, license and corruption, which are its inseparable concomitants. The history of every nation, after a great war, is a history of demoralization. The moral sense appears to be weakened by the spectacle of brute force contending with brute force; the sensibilities are blunted by indifference to suffering, and familiarity with death; the morals of camps are proverbially loose; the custom of destruction is apt to beget the love of it; and that regard for the rights and feelings of others, which is the chief glory of civilization, is lessened, if not lost, in the struggle for life and mastery in fight.

There may indeed be in nations, as in individuals, a stagnation and corruption worse than death; and war, like pestilence and famine, may be used by the Almighty as a scourge to drive them away, but that proves, not that war is a good thing in itself, but that there may be things that are worse.

Contention does undoubtedly sharpen the intellect, but there may be other kinds of contention than that of mere force. Indeed, that contention which aims to overcome obstacles in nature, to outstrip in manly arts, to look deepest into the mysteries of the world, material and spiritual; contention in letters and arts, in poetry, philosophy and history, in agriculture and navigation, in the refinements of life, the cultivation of taste, and the elevation of morals; that is the contention which really purifies and exalts.

We see that the waste and destruction of war are by no means the greatest of its evils, great as they are. We have before our eyes, at this moment, the devastation of one war, which lasted but a few months, but

which filled Germany with mourners, and covered France with wasted fields, and cities and villages battered and burnt. Half a year of war caused more sorrow and suffering than a century of peace.

It is, therefore, to be assumed that any well considered scheme which promises to lessen the number of wars, will receive the countenance of all good men. The scheme of the text is submitted, in the hope that, if it be not accepted, it may at least stimulate inquiry, and lead to some thing more acceptable, and more efficacious in preserving the peace of the world.

Whether it be possible to prevent war altogether, is the problem of the future, but it can not be doubtful that the chances and the occasions of its occurrence may be lessened. These articles are framed with that view. They are not the result of mere speculation. Most of them have experience of some sort, greater or less, to recommend them.

The rule requiring a statement of grievances to be made out and submitted to the government complained of, and requiring a definite answer, will tend to prevent wanton and unprovoked attack.

The rule requiring the creation of a Joint High Commission, which shall at least meet to discuss the differences, and seek to reconcile them, follows the precedent set by the United States and Great Britain, in their manner of treating the Alabama Dispute.

The submission to arbitration has already been stipulated in several treaties. It is an effectual and honorable mode of settling differences.

The manner of selecting arbitrators is suggested by the provisions of the Articles of Confederation of the United States of America, which were as follows:

"The United States, in Congress assembled, shall also be the last resort, on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given, by order of Congress, to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties, by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges, to constitute a court for hearing and determining the matter in question; but if they can not agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination; and if either party shall

neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or, being present, shall refuse to strike, the Congress shall proceed to nominate those persons out of each State, and the Secretary of Congress shall strike, in behalf of such party, absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear, or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress, for the security of the parties concerned; *Provided*, That every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward."

Why the several provisions of the text, or others of similar purport and design, should not be adopted, and why, if adopted, they should not answer the purposes intended, it would be difficult to say. National pride would not be touched, national interests would not suffer. War is a national duel. Private dueling, that is, private warfare, has been either abolished, or reduced to a minimum. If it has been found practicable to make individuals settle their disputes in some other way than by the rapier or the pistol, it is not easy to see why any number of individuals composing a nation should not be brought to do the same thing.

**538a.** The canal already made across the isthmus of Suez, and any canal that may hereafter be made across the Isthmus of Panama, shall be deemed neutral territory, in all cases of war between any nations whatever, and no capture, detention, or injury of any kind shall be made or inflicted by any belligerent upon the ships or other property of any other belligerent, or upon the person of any member of a belligerent nation, either on the line of the canal, or within sixty nautical miles of either extremity thereof.

For a full discussion of the reasons for this article, see a series of papers in the *London Hour*, by Sir Travers Twiss.



# DIVISION SECOND.

## PRIVATE INTERNATIONAL LAW.

### PART V. PRIVATE RIGHTS.

#### VI. ADMINISTRATION OF JUSTICE.

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## PART V.

### PRIVATE RIGHTS.

#### TITLE XXIV. CONDITION OF PERSONS.

##### XXV. PROPERTY.

##### XXVI. OBLIGATIONS.

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The general principles which have been kept in view in framing the Articles of this Division, and which are discussed in more detail in various notes, may be indicated as follows :

1. Each nation should be allowed to regulate all transactions affecting the ownership of its own soil. According to some authorities, the capacity of the person, as to taking or conveying, depends on the law of his nationality,—(*Fœlix, Droit Intern.*;) but this does not seem reasonable.

2. Each nation should be allowed to regulate all transactions had within its limits, whether between citizens or foreigners, except such as affect the ownership of the soil of another nation.

These principles are commended alike by their recognition of the fundamental doctrine of the territorial sovereignty of nations, by their affording individuals convenient means of knowing what the law is to which they must conform in every case, and by their being in harmony in these respects with the progress and tendency of modern jurisprudence.

The ancient rule, of oriental origin perhaps, maintains the sovereignty of the laws of a nation over the personal capacity, and, therefore, over the transactions of its own members, even when they are within the territory of another nation, opposing in this respect the territorial sover

eignty of others. This claim, which even the nations asserting it do not reciprocally yield to other nations, has necessarily given rise to much conflict and uncertainty, for it requires that a citizen dealing with a foreigner should ascertain at his peril the fact of the foreigner's alienage, the nationality he bears, and the law of that nationality respecting the personal capacity of the foreigner.

The general rule demanded by modern commerce, and which is gradually forcing its way into recognition in all civilized countries, is, that contracts, and other acts not affecting the soil of a foreign nation, are valid everywhere, if valid by the law of the place where they are made or are to be performed, subject to certain simple restrictions necessary to guard against the use of the law of one place to sanction wrongful evasions of the law of another, or to prejudice creditors in another. This is the only rule which alike satisfies the sovereignty of the State, and puts it in the power of every person to ascertain the rule of law to which he is bound to conform.

In the application of these principles, it is to be observed that, as to any transaction constituted by several acts done in different jurisdictions, the Code must furnish a test to determine which place shall be considered the one where the transaction is had, and that uniformity of rights and remedies should be secured as far as may be, without respect to the difference of *forum*.

The exceptions and qualifications of these leading principles are considered as they arise, in the different Articles of the Division.

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## TITLE XXIV.

### CONDITION OF PERSONS.

#### CHAPTER XXXVIII. General provisions.

##### XXXIX. Marriage.

##### XL. Guardianship and mental alienations.

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## CHAPTER XXXVIII.

## GENERAL PROVISIONS.

**ARTICLE 539.** Liberty.

540. Foreign slaves become free by entering free nation.

541. Rank and social condition.

542. Personal capacity.

543. Exception.

544. Personal capacity as to immovables.

545. Corporate capacity.

*Liberty.*

**539.** Man is not the subject of ownership. Every human being is a person, that is to say, a being capable of acquiring rights and exercising them ; and no one is subject to slavery or involuntary servitude except in punishment for crime, of which he has been duly convicted.

*Bluntschli, Droit Intern. Codifié, § 360; Constitution of the United States, 13th Amendment.* As to the duty of nations to persons coming within their jurisdiction from states which maintain slavery, see Chapter XXIV., on the PERSONAL CONDITION OF FOREIGNERS.

*Foreign slaves become free by entering free nation.*

**540.** If, by the law of any nation not a party to this Code, the slavery of human beings is permitted, such slavery is local, and the slaves become free on coming within the jurisdiction<sup>1</sup> of any free nation, and such nation is bound to respect and defend their liberty.

*Bluntschli, Droit Inter. Codifié, §§ 361, 362.*

<sup>1</sup> This, by Article 309, includes the region within the lines of an army or fleet, as it should. *Lieber's Instructions, § 2, ¶ 43.*

*Rank and social condition.*

**541.** The privileges of rank or social condition are local, and confined to the places<sup>1</sup> within the jurisdiction of the nation by the laws of which they exist, and

affect only acts done and rights acquired within such jurisdiction.

This article does not apply to the rank or privileges of foreign sovereigns ;<sup>2</sup> nor to those of agents of international intercourse ;<sup>3</sup> nor to such privileges of foreign rank or social condition as a nation may recognize by special regulation.<sup>4</sup>

<sup>1</sup> They are not confined to the *territory*, but exist in the places which, by Article 309, are subject to extra-territorial jurisdiction.

<sup>2</sup> See Article 15, concerning the subjection of the sovereign or chief officer of a nation to the jurisdiction of another nation.

<sup>3</sup> See Chapters XII. and XIII., concerning PUBLIC MINISTERS and CONSULS.

<sup>4</sup> Of course, it is competent for any nation to recognize foreign rank or privilege.

### *Personal capacity.*

**542.** The civil capacities and incapacities of an individual in reference to a transaction between living persons,<sup>1</sup> except so far as it affects immovable property, and subject also, in the case of public funds, corporate stocks and shipping, to the provisions of articles 572 and 573, are governed by the law of the place where the transaction is had, whatever may be his national character or domicil, or the place of his birth.

This is the American rule, as laid down in the case of *Polydore v. Prince, Ware's Rep.*, 402, (*U. S. Dist. Ct., Maine*, 1837,) on a review of many authorities ; and it is submitted as the plain and reasonable rule, which will solve many vexed questions. See, also, *Story, Conf. of L.*, §§ 79, 93. It is not, however, the rule now recognized by European international law, although the tendency of opinion is in this direction.

The conflicting rules laid down by other authorities upon this point, may be stated thus :

1. The capacity of a person is governed by the law of the *nation* of which he is a member, even when he is resident in a foreign country. This is the rule declared by the *French Code Civil*, Art. 3, as governing the status of Frenchmen, but there seems to be no corresponding rule as to the status of foreigners in France. (*Westlake Private Intern. Law*, p. 381.) It is to be sustained, if at all, by the principle that every nation is the best judge of the capacity or want of capacity of its native subjects. But it is a sufficient objection to the recognition of any such rule in international relations, that, although a nation can within its own jurisdiction maintain the rule over its members, it would involve grave



inconveniences to make it reciprocally a rule for nations to apply to all foreigners who may be sojourning within their dominions. See the case of *Saul v. His Creditors*, 17 *Marten's Rep.*, 596; *Livermore's Dissertation on the Contrariety of Laws*.

2. The civil capacities and incapacities of an individual are to be determined by the law of *his domicile*.

*Woolsey* states this to be the rule, and he says, "According to this rule, if a person changes his domicile, he acquires a new jural capacity, by which, in foreign parts, his actions are to be measured. This is true universally, but in many cases the courts of the earlier domicile, especially if it were the person's native country, have shown a leaning, not to be justified, towards holding him under their territorial law." The reasons which justify this principle are, he says, "(1.) That otherwise extreme inconvenience would result to all nations from a perpetual fluctuation of capacity, state and condition, upon every accidental change of place of the person or of his movable property. (2.) That the person subjects himself and his condition, of free choice, to the law of the place where he resides, by removing there or continuing there."

In consideration of the great increase of intercourse and the extended and important interests dependent upon the transactions of transitory as well as domiciled foreigners, it seems just to apply more fully the general principle, that every nation has jurisdiction over all transactions within its territorial limits, and while removing the general disabilities of aliens, as is already done in so many cases by treaty, it should seem reasonable, on the other hand, to subject the transactions of aliens to the regulation of the ordinary local law in all that does not affect the title to immovable property situate in other jurisdictions.

The general rule will then be, that, subject to the jurisdiction of each nation over all property within its limits, the efficacy of a transaction depends upon the law of the place where the transaction is had.

In this respect the force of the observation of *Story* is admitted, (*Conf. of L.*, § 76,) that contracts ought to be governed by the law of the country where they are made, as to the competence of the parties, and as to their validity, because the parties may well be presumed to contract with reference to the laws of the place where the contract is made and is to be executed. Such a rule has certainty and simplicity in its application. See, also, *Fergusson on Marriage and Divorce*, App., 361, cited in *Story, Conf. of L.*, § 97.

*Story, Conf. of L.*, p. 69, &c., states the following rules as being best established, or as at least having the sanction of such authority as gives them superior weight in the jurisprudence of *Continental Europe*.

The acts of a person done in the place of his domicile, in regard to property situated therein, have no other legal effect elsewhere than they have in that place. *Story*, § 64.

The personal capacity or incapacity attached to a party by the law of the place of his domicile, is deemed to exist in every other country, as long as his domicile remains unchanged, even in relation to transactions in a foreign country, where they might otherwise be obligatory.

This rule is founded, according to *Rodenburgh*, upon the inconvenience

which would result from a fluctuating rule of capacity upon every accidental change of place of the person or of his movable property. *Story*, p. 72, § 67. It ought to be observed, however, that the inconvenience of a fluctuating rule is an inconvenience to the individual only, requiring him to ascertain and conform to the law of the place where he may be. It is the most convenient for facilitating commercial transactions and the administration of justice. In case of a change of domicile, these rules would apply in the country of *new* domicile, and perhaps in every country except that of the original domicile. *Id.*, § 70.

*Story*, upon a review of the authorities, concludes that there is no general rule on the subject admitted by all nations, and that the exceptions conceded by the advocates of the universal operation of the law of the domicile show that no general rule can be adopted which may not work inconvenience to the interests of some countries, institutions or capacities, and that the conclusion is that no nation is obliged to recognize the foreign law of capacity; that the place determines the validity of the act, subject to the right of each nation to refuse to enforce or recognize acts contrary to their laws or policy.

For a recent discussion of the doctrine of personal statute and real statute, see *Exposé critique des principes généraux en matière de statuts réels et personnels d'après le droit Français*, par F. Laurent, *Revue de Droit International et de Legis. comp.*, 1869, No. 2, 244.

<sup>1</sup> Testamentary capacity is regulated by Chapter XLIV., on WILLS.

### *Exception.*

**543.** No transaction had by a foreigner, being one between living persons, is voidable on the ground of his infancy, except so far as it may affect immovables, if either the law of his domicile, or the law of the place where the transaction is had, sustains his capacity.

This is the provision of the Prussian law with reference to foreigners' contracts, stated by *Westlake*, (*Private Intern. L.*, p. 383,) who recommends a similar provision for adoption in England. It is proposed here, in order to meet the objection, stated by him, and in the case of *Saul v. His Creditors*, (17 *Marten's Rep.*, 596, 5 *Marten's N. S.*) in *Burge's Com. on Colonial Law*, p. 132, and other authorities, of allowing aliens who are beyond the age fixed for majority by the local law, to elude the obligation of contracts on the ground of a foreign disability, with which those dealing with them could not be presumed to be acquainted.

In *re Hellman's Will*, (*Law Rep.*, 2 *Equity*, 363,) it was held, that a legacy bequeathed to an infant domiciled abroad might be paid when the infant came of age by the law of the testator's domicile or by the law of the infant's domicile, whichever should first happen, but in the mean time must be dealt with as an infant's legacy, according to the law of the testator's domicile, although, by the law of the infant's domicile, the guardian would be entitled to receive it.

<sup>1</sup> The rule is restricted so as not to apply to wills.

*Personal capacity as to immovables.*

**544.** The civil capacities and incapacities of an individual in reference to immovable property, are to be determined by the law of the place where the property is situated.

In the conflict of authority among continental jurists on this point, that rule is taken, which is established in England and America, that the territorial laws of each nation must determine the capacity of those who may take or transfer title to lands. See *Story, Conf. of L.*, § 430.

For the French doctrine respecting the extent to which the law of the location of immovables regulates the capacity of the person in respect to them, and the rights resulting from transactions in reference to them, see *Felix, Droit Intern.*, vol. 1, p. 21.

*Demangeat* is of opinion that, when once it is clear that the law of the place where the immovables are situated does not exclude the foreigner in his quality of foreigner, from the right to dispose of or to receive, thenceforth all questions of capacity or incapacity must be determined according to the rules of law applicable to the person of the foreigner. (*Felix, Droit Intern.*, vol. 2, p. 122, note *a.*)

The objection to the rule allowing the law of the nationality to govern in reference to infancy, is again mentioned under another article.

The following modification of this rule is laid down by *Story, Conf. of L.*, § 104 :

Personal disqualifications, imposed by the customary or positive law of the nation of the foreigner, will not be recognized in other countries where the like disqualifications do not exist.

*Corporate capacity.*

**545.** Corporations and other artificial persons have no existence beyond the jurisdiction of the power by virtue of which they exist, and have no capacity beyond that which is conferred by the law of such power.

This is the settled doctrine of the American Law of Corporations, *Bank of Augusta v. Earle*, 13 *Peters' U. S. Supreme Ct. Rep.*, 588 ; *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286 ; *County of Allegheny v. Cleveland, &c., R. R. Co.*, 51 *Pennsylvania Rep.*, 228 ; and other cases collected in *Abbott's Digest of the Law of Corporations*, pp. 336, 567.

Several of the French treaties contain a provision to the effect that corporations, companies and associations, commercial, moneyed and industrial, as well as jointstock companies and societies of limited liability, formed and authorized according to the laws of either nation, have and may exercise their rights and powers, and may appear in court, whether to institute or to defend actions, in any place within the territorial limits of the other nation, without any other condition than that of conformity to the laws of such nation.

This provision applies as well to such bodies formed previous to the adoption of the treaty, as those which are thereafter formed.

Treaty of commerce and navigation between France and

The Free Cities of Lübeck, Bremen & Hamburg, } Mar. 4, 1865, Art. XVIII., 9 *De Clercq*, 187.

Grand Duchy of Mecklenburg - Schwerin, —  
(extended to the) Grand Duchy of Mecklenburg-Strelitz, } June 9, 1865, " XXI., 9 *Id.*, 295. \*

Turkish and Egyptian business corporations are authorized to exercise their powers in France. 7 *De Clercq*, 614.

See, also, imperial decrees of February 27, 1861, affecting the relations of France, Luxembourg and Portugal.

It would, however, hardly be wise to take such a rule as a general one, but better to leave corporations with the powers conferred by the domestic law only, except where such special treaties exist.

## CHAPTER XXXIX.

### MARRIAGE.

**ARTICLE 546.** "Marriage" defined.

547. Valid foreign marriages.

548. Void marriages.

549. Capacity and consent.

550. Requisite forms.

551. Public ministers and consuls may solemnize marriages.

552. Criminal offenses.

553. Evasion of home law.

554. Personal, marital and parental rights.

555. Polygamy.

556. Legitimacy.

*"Marriage" defined.*

**546.** The term "marriage," as used in this Code, means the union, voluntary and for life, of one man with one woman.

*Lawrence's Commentaire sur Wheaton*, vol. III. See *Revue De Droit International*, &c., 1870, No. 1, p. 53.

"Marriage is one and the same thing, substantially, all the world over. . . . We regard it as a wholly different thing, a different status

from Turkish or other marriages among infidel nations." Lord Brougham, in *Warrender v. Warrender*, 2 *Clark & Finnelly's Rep.*, 532.

The definition of marriage, as understood by the law of nations, given in *Rock v. Washington*, 19 *Indiana (Kerr) Rep.*, 53, is as follows :

Marriage is the union of one man and one woman, so long as they both shall live, to the exclusion of all others, by an obligation which, during that time, the parties can not, of their own violation and act, dissolve, but which can be dissolved only by authority of the State.

And it is there added, that nothing short of this is meant when it is said that marriages, valid where made, will be upheld in other States (Citing *Noel v. Evans*, 9 *Indiana*, 37; *Story's Conflict of Laws*, ch. 5 *Wheaton's Law of Nations*, 137.)

See *Hyde v. Hyde*, *Law Rep.*, 1 *Probate and Divorce*, 130. In this case, the court were in error in supposing, according to the testimony, that a polygamous marriage is valid in Utah. By the act of Congress of 1862, such marriages are illegal. See *Lawrence's Commentaire sur Wheaton*, vol. III., quoted in *Revue de Droit International, &c.*, 1870, No. 1, p. 57.

### *Valid foreign marriages.*

**547.** Subject to the provisions of Part VI., on the ADMINISTRATION OF JUSTICE,<sup>1</sup> a marriage, valid according to the law of the place where it is contracted, is valid everywhere, and the issue of such a marriage is everywhere legitimate.

This, in so far as it relates to the form of marriage, is the general doctrine, supported by all authorities. And it applies as well to transient as to domiciled persons. 1 *Bishop on Marriage and Divorce*, § 353.

By the French law, the rule is modified by the application, together with it, of the principle that the laws concerning the status and capacity of persons, control Frenchmen, even when resident in foreign countries. *Felix, Droit International*, vol. 2. p. 367.

But there is considerable disagreement of opinion as to what exceptions should be allowed to this general rule. The following have each the sanction of some authority :

1st. Polygamous marriages. These are excluded by the definition in Article 546. Such obligations of the married state as it may be proper to impose upon the parties to a polygamous union, when the case arises in a Christian country, are provided for in Article 555.

2nd. Marriages which are incestuous by the law of the place where they are drawn in question. *Ponsford v. Johnson*, 2 *Blatchford's U. S. Circuit Ct. Rep.*, 51; *Story on Conflict of Laws*, § 87. But *Parsons* suggests, that a question might be made whether it would be held incestuous, so far as to avoid the marriage, if the parties were only within the degrees prohibited by the law of the State in which the question arose, or if they must have been too near to marry by the law of the civilized world. 2 *Parsons on Contracts*, 599. And *Shelford* (on *Marriage and Divorce*, 127, 7.) as well as *Bishop* (on *Marriage and Divorce*, vol. 1, §

389,) intimates the same opinion. *Huberus*, as quoted by *Story*, (*Conflict of Laws*, § 85,) says, that "a foreign marriage would be void if it were a case of incest within the second degree by the law of nations." It should seem best to disregard this exception, beyond the cases covered by Article 552.

3rd. Personal incapacity. *Savigny* supposes (§ 379) that the personal capacity of the wife is to be judged according to the law of her home. *Westlake* submits, that from those bars which depend on what is called incapacity, whether absolute, as from Romish orders, or relative, as from degrees of affinity, the parties must be free both by the law of the place where the marriage is celebrated, and by that of the husband's domicile; that if they are so free, their marriage will be good, always and everywhere.

4th. Opposition of parents or guardians. It is the opinion of *Westlake* that the *lex loci contractus* may reasonably adopt any consent of parents or guardians, required for the marriage of either party in his or her domicile, as the condition without which it will not give binding force to the forms of the contract. The English courts, however, have persevered in maintaining that no other consents than those which the *lex loci contractus* demands for the marriage of its own subjects, are necessary for the marriage of foreigners celebrated within its jurisdiction. *Westlake*, *Private Intern. Law*, 325.

5th. Informal solemnization. *Savigny* thinks, that where an inhabitant of a State which requires religious ceremonies of a marriage, forms a civil marriage in a foreign country, according to its laws, this is not enough, on the ground that the laws of his domicile have a moral and religious basis, and have a coercive character. The marriage ought to be celebrated anew, according to the religious forms of the man's own domicile. *Woolsey*, *Intern. Law*, § 74.

But the settled rule in England and the United States is, that the solemnities are sufficient, if conformable to the law of the place of solemnization.

6th. Marriages contracted abroad, in evasion of the law of the domicile. *Huberus*, cited by *Story*, (*Conf. of Laws*, § 85,) says, that where persons belonging to one country, go into another to be married, merely to evade the laws of their own country, the marriage is void, although it be good by the law of the place where it is celebrated. *Parsons* inclines to favor this principle, although he admits the settled rule of England and the United States to be the contrary; and so it is stated by *Kent*. (2 *Commentaries*, 92.) The conflict might perhaps be reconciled, by making a distinction between evasion of the law of capacity and evasion of the law of solemnization. See *Story*, *Conflict of Laws*, § 86. If this exception were allowed at all, it ought not to prejudice the innocent party, where the intent of evasion existed in the mind of one party only. *Ponsford v. Johnson*, 2 *Blatchford's U. S. Circuit Ct. Rep.*, 51.

Besides these exceptions, there are others, vaguely stated by some writers, such as that the *lex loci contractus* should not prevail, to the prejudice of another, or where it works manifest injustice, or is contra

*bonos mores*, or is repugnant to the settled principles and policy of the *lex fori*.

The six exceptions above stated are all that seem worthy of notice. Most of them should be disallowed. The simple rule, which if adhered to, will solve many troublesome questions, and will tend towards harmonizing jurisprudence is, that, the efficacy of a transaction depends on the law of the place where it is had. It should seem proper to apply this rule to the subject of marriage, with as few exceptions as possible; and the effect of the provisions here presented will be only to except polygamous and incestuous marriages, and these so far only as they would justify the maintenance of a personal relation within a jurisdiction which makes such relation a criminal offense.

<sup>1</sup> Where the validity of a marriage depends on the validity of a previous divorce, the rules of Part VI., on THE ADMINISTRATION OF JUSTICE, which forbid certain divorces, may result in an exception to the rule that the law of the place is the test of the validity of marriages.

### *Void marriages.*

**548.** A marriage invalid according to the law of the place where it is contracted, is invalid everywhere; and the issue of such marriage is everywhere illegitimate.

*Bishop* states two exceptions to this rule. First, in the case of a victorious invading army, which carries with it the laws of its own country, for the protection of persons within its lines and general range of dominion. Secondly if parties are sojourning in a foreign country, where the local law makes it impossible for them to contract a lawful marriage under it, they may marry in their own forms, and the marriage will be recognized at home as valid. *Bishop on Marriage and Divorce*, Vol. I. §§ 391, 392. The first is included by the form of statement above, and the definition of the "law of place" in Article 310; and the second exception should not be allowed.

### *Capacity and consent.*

**549** The last two articles include the age requisite for marriage, and the necessity for the assent of parents, guardians, or public authorities, and the conditions for obtaining or seeking their assent or giving opportunity for their dissent; and to all other questions of capacity, except those dependent on the validity of a previous divorce.

The continental rule is understood to refer these questions to the law of the domicile of the party in question, or (as in the case of France) to the law of his or her nationality.

The English law applies its own tests to determine the validity of a marriage abroad, of English subjects not domiciled abroad. *Brook v. Brook*, 7 *Jurist*, (N. S.) 422; *Shaw v. Gould*, *Law Rep.*, 3 *House of Lords*.

55; *Fenton v Livingston*, 5 *Jurist*, (N. S.), 1183. But the Article above proposed is in harmony with the general rules in reference to status, proposed in this Code. And Article 552 avoids marriages which are contrary to the positive law of the home of the parties, when drawn in question there.

*Burge*, after discussing the cases at some length, states the result of the opinions of jurists and the decisions of judicial tribunals to be: That the validity of the marriage, both in respect of the competence of the parties to contract, and of the solemnities with which they contract, is to be decided with reference to the law of the place in which the marriage is contracted; and, if it be valid *secundum legem loci contractus*, it must be deemed valid in every other place, if it do not violate the law of nature, public morals, or the policy or institutions of that State in which its validity is sought to be established. *Burge on Foreign and Colonial Law*, vol. I., p. 199.

It was held in *Kinnaird v. Leslie*, (*Law Rep.*, 1 *Common Pleas*, 389,) that an attainder inflicted in one country ought not to affect the validity of a marriage subsequently contracted by the attainted person in a foreign country with an innocent woman who may not have known of the attainder.

### *Requisite forms.*

**550.** Except in the cases provided for in the next article, those forms of celebrating marriage which are optional or obligatory for the members of a nation, are equally optional for foreigners, and equally obligatory for them unless dispensed with by the law of the place.

This is understood to be the generally established rule.

It might be well to add such a saving clause as the following:

If, however, any religious ceremony shall be obligatory for citizens, any foreigner who shall depose before a magistrate that he can not conscientiously submit to it, shall, after the completion of all other forms necessary, be admitted to marry any other foreigner or a member of the nation, by means of a written contract, signed by both parties, and deposited with such magistrate.

By the declaration of December 24th, 1867, between France and the Grand Duchy of Luxembourg, for the purpose of simplifying the legalization of papers produced by the subjects of either country on contracting marriage in the other, it was provided that such documents, certified either by the president of the tribunal or a judge *de paix* or his deputy, should be received by the civil officer of the other country, and no other legalization should be demanded, except in case of doubt respecting the authenticity of the document.

*Public ministers and consuls may solemnize marriages.*

**551.** Public ministers within the nations to which



they are accredited, and consuls within their respective districts, may solemnize marriages between parties either or both of whom are members of the nation of such officer, pursuant to such forms and under such restrictions as may be prescribed by that nation. Such marriages are valid, as if solemnized or contracted within the territorial jurisdiction of such nation according to its laws.

This Article is suggested by the British Consular Marriage Acts of 1849 and 1868, 12 and 13 *Vict.* 224, ch. 68 ; 31 and 32 *Vict.* 264, ch. 61 ; and the American act of June 22, 1860, § 29, 11 *U. S. Stat. at L.*, 55.

*Burge* lays down the rule, that : The parties are excused from conforming to the *lex loci contractus*, if they belong to the State, the subjects of which form a separate and distinct community in the foreign country in which they are married, as in the case of the British factories established in various parts of Europe and Asia ; or if they belong to a State which has taken hostile possession, and is in the occupation, of the foreign country ; or if they belong to the State whose ambassador is established in the foreign country. In these instances the parties may celebrate their marriage according to the law of their own country. *Burge on Foreign and Colonial Law*, I., p. 200.

### *Criminal offenses.*

**552.** A marriage, though valid according to the law of the place where it is contracted, will not be recognized as valid in any country in which the circumstances of such marriage would render the personal relation between the parties a crime.

### *Evasion of home law.*

**553.** The act of persons contracting marriage in a nation in which they are not domiciled, in evasion of the law of the nation or domicile of either, may be made a criminal offense, but the validity of the marriage, if consummated, and the legitimacy of its issue, shall not be affected thereby.

There is not wanting sanction for the opinion that such a marriage is void. But *Westlake*, (*Private Intern. Law*, p. 323,) forcibly points out the embarrassment resulting from making the validity of a marriage depend on so uncertain an element as the opinion, which a court may form, respecting the motive of a journey.

### *Personal, marital and parental rights.*

**554.** Except as otherwise provided by this Code,<sup>1</sup> the personal, marital and parental obligations and corre-

lative rights of the parties to a marriage at any time, are governed exclusively by the law of the place where they may be, unless polygamy there exists.

This depends on the principle that it is within the jurisdiction of any State to regulate the personal relations of all persons within its limits.

When married parties go from one jurisdiction to another, their marriage status assumes the peculiar hue, which the law of the place, where they temporarily or permanently are, gives to it. *Bishop on Marriage and Divorce*, § 407.

<sup>1</sup> See Chapter XXI., on DOMICIL, ORIGINAL AND SECONDARY.

### *Polygamy.*

**555.** A polygamous union, though contracted in a polygamous nation, does not sanction the cohabitation or the divorce, of the parties, in any other nation ;<sup>1</sup> but the obligations and restrictions in other respects resulting from marriage, and the rights of property dependent thereon, may be recognized by any nation as applicable to the parties to such a union, in cases within its jurisdiction.<sup>2</sup>

<sup>1</sup> *Hyde v. Hyde*, 35 *Law Journal*, (N. S.,) *Divorce Cases*, 75.

<sup>2</sup> It is submitted that, for the purpose of such obligations, toward the public, as arise out of the relation, a polygamous marriage should be recognized. For instance, it should preclude the polygamist from contracting a subsequent marriage, during the life of any existing consort ; it should not exonerate him from the obligations arising out of the relation of parent and child. It seems proper, too, that on the question of the succession to foreign assets, it should be considered as part of the law of the polygamous nation, whenever that law comes in to regulate the succession.

### *Legitimacy.*

**556.** The legitimacy or illegitimacy of a person, as deduced from the law of the place where a marriage of the parents was contracted, is a personal attribute, and does not affect the succession to immovables situated in any other country, which would not recognize the person as legitimate, if the marriage had been contracted in such country, at the time when it was actually contracted.

*Story*, (*Conf. of L.*, § 93 b, &c.,) regards it as generally admitted by foreign jurists, that, as the validity of the marriage must depend upon the law of the country where it is celebrated, the status, or condition of their offspring as to legitimacy or illegitimacy, ought to depend on the same law, especially if the parents were domiciled there ; and there would be

some authority for extending this rule to control the succession to real property in foreign States.

According to *Savigny*, the laws of the place, where the birth of a child born out of wedlock actually takes place, exclusively determine whether he can be legitimated by subsequent marriage. *Savigny*, p. 257. *Schaeffner*. See also, *Story, Conf. of L.*, § 93, s. But a legitimation of a subject by the rescript of his sovereign, if effectual according to the laws of the country where the person legitimated has his domicil, has the same virtue everywhere. *Savigny*, p. 258.

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## CHAPTER XL.

### GUARDIANSHIP AND MENTAL ALIENATION.

ARTICLE 557. Natural and testamentary guardians.

558. Judicially appointed guardians.

559. Sanity.

#### *Natural and testamentary guardians.*

**557.** The natural guardianship of a father or mother over the person of a child, and testamentary guardianship,<sup>2</sup> acquired or conferred according to the law of one nation must be recognized in every other nation; subject to the power of the courts to interfere in the cases prescribed in Article 634.

<sup>1</sup> By the law of some States, the natural guardianship of the mother is recognized, upon the death of the father, and this Article accordingly provides for the mother's right;

<sup>2</sup> Testamentary guardianship is also included in this Article because it stands in the place of natural guardianship. *Westlake, (Private Intern. Law, p. 380,)* however, is of opinion that testamentary guardianship depends on the same principle as judicial or statutory guardianship.

#### *Judicially appointed guardians.*

**558.** The guardianship or other custody of the person or property of one not having legal capacity, created by a foreign court of competent jurisdiction, in the cases provided in Article 633, must be recognized and respected by courts of any other country into which the ward comes, subject to the power of the courts to interfere in the cases prescribed in Article 634.

This provision is founded on the decisions in *Nugent v. Vetzera*, *Law Rep.*, 2 *Equity*, 704; and *Townsend v. Kendall*, 4 *Minnesota Rep.*, 412, extending it to other cases than that of infancy. In the first mentioned decision Vice-Chancellor WOOD said: "Having regard to the present international law and to the course which all courts have taken, recognizing the proceedings of the regularly constituted tribunals of all civilized communities, and especially of those in amicable connection with this country, it is impossible for me entirely to disregard the appointment of a guardian by an Austrian court over these children, who are Austrian subjects and children of an Austrian father, merely because those who preceded the defendant in his guardianship have taken the course of sending them over to this country for the purpose of educating them, seeing that he is now desirous of revoking that arrangement. It would be contrary to all principles of right and justice if the court were to hold that where a parent or guardian in a foreign country avails himself of the opportunities for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this court might be of opinion that an English grade of education is better than that adopted in the country to which they belong."

And in this case an order appointing English guardians was declared to be without prejudice to the foreign appointment; and that the foreign guardians as such should have the exclusive right to the custody and control of the infants, with liberty to apply for the removal of the children from the country.

In the case of *Townsend v. Kendall*, above referred to, the court said: That it would lead to great inconvenience if it should be held that a guardian could not exercise his authority or be recognized out of the state, or locality of his appointment. It would embarrass the guardian in investing the funds of the ward in securities of other states, and render it necessary that he should be reappointed in every state or country through which he should pass with his ward in traveling, if an emergency should arise in which it became necessary to exert his authority.

The court added, (referring to *Story, Conf. of L.*, §§ 495-507,) "From a very careful examination of all he says, and the cases to which he refers, which have been attainable, we think the better rule is, upon principle and authority, to recognize the foreign appointment of a guardian, as creating that relation between the parties in this State, subject, of course, to the laws of this State, as to any exercise of power by virtue of such relation either as to the person or property of the ward. Provision has been made by the statutes of this State for the manner in which foreign guardians shall act when they desire to sell the real property of their wards situated within this State. (Comp. Statutes, p. 423, §§ 43, 44.) All that is necessary to obtain full recognition as guardian, is to file an authenticated copy of the foreign appointment in the Court of Probate of the county where the land is situated, and the foreign guardian is at once admitted to the same rights and powers over the real estate of his ward situated within the county that are possessed by a guardian of our own appointment." Consult, also, *Westlake Private Intern. Law*, p. 380; and *Johnstone v. Beattie*, 10 *Clark & Finnelly's Rep.*, 114.

It was held in New York Surrogate Court, 1869, *Biolley's Estate*, 1 *Tucker's Rep.*, 422, that the usual treaty provision as to succession of foreigners (Treaty between the United States and Switzerland, 1850,) does not require a reciprocal recognition of foreign guardians.

The foregoing Article is restricted to the case of guardians appointed judicially, so that the right of appointment by will, which in many of the States is recognized as existing in the parent, may be included in the previous Article respecting *natural and testamentary guardians*.

Surrogate BRADFORD, in stating the rule that foreign guardians have no extraterritorial authority, says: "The reason upon which a foreign guardian is denied any recognition of his title, is substantially this,—that all his authority springs out of his official character; and a civil officer, as such, can, of necessity, possess no power beyond the limits of the sovereignty by which he is appointed. Such exceptions as may exist have been admitted not *de jure*, but *ex comitate*. The *lex fori* primarily prevails in the form and order of the administration of justice, and foreign law is only received so far as it is found consonant with sound principle and public convenience—it is accepted on the basis of international comity, and not because of any inherent right. The continental jurists go further, and insist upon the absolute right and title of the guardian appointed at the place of domicil, wheresoever the ward is to be represented; but neither in England nor in the United States does this doctrine prevail." *McLoskey v. Reid*, 4 *Bradford's (New York) Surrogate Rep.*, 334.

<sup>4</sup> *Woolsey*, (*International Law*, p. 122,) states that, the guardian empowered according to the law of the ward's domicil, which will usually be that of the deceased parent, exercises control over the ward's property wherever situated. But in the case of immovable property the *lex loci rei sitæ* may prevent such control of a foreigner, and it may be necessary to appoint a special guardian residing within the jurisdiction.

### *Sanity.*

**559.** The laws determining the lunacy or idiocy of any person are territorial only; and a decision that a person is a lunatic or idiot will bind that person and his movables, whether he be a citizen or an alien, only while he is domiciled within the jurisdiction of the country in which such decision was made, and will bind the immovables of such person situated in that country, whether the domicil therein do or do not continue, but will not bind such person in any other country, nor the immovables of such person situated in any other country.

See, however, *Westlake, Private Intern. Law*, § 402, who says that "While the English law remains as it is, it must, on principle, be taken as excluding, in the case of transactions having their seat there, not only a foreign age of majority, but also all foreign determination of status or

capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the Continent. Thus, an act facilitating the transfer of property vested in lunatics, can not be applied on the strength of a judgment, by a foreign competent court, declaring the person a lunatic; nor will the committee appointed by such court have any authority over the lunatic's person here."

## TITLE XXV.

## PROPERTY.

## CHAPTER XLI. General provisions.

XLII. Transfer.

XLIII. Succession.

XLIV. Will.

## CHAPTER XLI.

## GENERAL PROVISIONS.

- ARTICLE 560.** Property defined.  
561. What things are property.  
562. What wild animals.  
563. Real and personal property.  
564. Real property.  
565. Land.  
566. Fixtures.  
567. Appurtenances.  
568. Personal property.  
569. Property in possession, or in action.  
570. Law of immovables.  
571. Law of movables.  
572. Local character of public funds, and corporate shares.  
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575. Rights of property of persons married without a settlement.  
576. Matrimonial property after change of domicil.  
577. "Matrimonial domicil" defined.  
578. Abandonment.

*Property defined.*

**560.** The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of

others. In this Code, the thing of which there may be ownership is called property.<sup>1</sup>

This and the eight following Articles are from the *Civil Code, reported for New York*, § 159, &c.

<sup>1</sup> In another sense, property is the *right* of a person or persons, public or private, to appropriate a thing (tangible or intangible) to the exclusion of its promiscuous use by others. This has been also called *domain*. The word is here used, however, in its more general sense.

*What things are property.*

**561.** There may be ownership of all inanimate things which are capable of appropriation, or of manual delivery; of all domestic animals; of all obligations; of all products of the mind; of such products of labor or skill, as the good will of a business, trade-marks and signs; and of rights created or granted by statute.

*Wild animals.*

**562.** Animals wild by nature are the subjects of ownership while living, only when on the land of the person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued.

*Real and personal property.*

**563.** For the purposes of this Code, property is designated as either,

1. Real or immovable; or,
2. Personal or movable.

*Real property.*

**564.** Real or immovable property consists of,

1. Land;
2. That which is affixed to land; and,
3. That which is incidental, or appurtenant to land.

The existing rule of international law is that the question whether an article of property is or is not an immovable, is to be determined by the law of the place where such article of property is locally situated. *Story, Conf. of L.*, § 447; *Felix, Droit Intern. Privé*, vol. I., p. 121. The above Article, and the four following, which are taken from the *Civil Code, reported for the State of New York*, are suggested in order to secure a uniform rule for all cases arising under this Code.

*Land.*

**565.** Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.



*Fixtures.*

**566.** A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs ; or imbedded in it, as in the case of walls ; or permanently resting upon it, as in the case of buildings ; or permanently attached to what is thus permanent, as by means of nails, bolts or screws.

*Appurtenances.*

**567.** A thing is deemed to be incidental <sup>1</sup> or appurtenant <sup>2</sup> to land, when it is by right used with the land for its benefit ; <sup>3</sup> as in the case of a way, or water-course ; or of light, air or heat, from or across the land of another.

<sup>1</sup> *Smyles v. Hastings*, 22 *New York Rep.*, 217, 222.

<sup>2</sup> *Lampman v. Milks*, 21 *New York Rep.*, 505, 511.

<sup>3</sup> *Ackroyd v. Smith*, 10 *Common Bench Rep.*, 164, 187.

*Personal property.*

**568.** Every kind of property that is not real, or immovable, is personal, or movable.

*Property in possession or in action.*

**569.** Personal property is of two kinds :

1. Property in possession ; and,
2. Property in action.

Property in possession can only be such as is capable of manual delivery.

*Law of immovables.*

**570.** The law of the place where immovables are situate, exclusively regulates and determines the rights of parties, the modes of transfer, or of charging or otherwise disposing thereof, whether between living persons or by will, and the formalities to accompany them.

As to the extent to which this rule is adapted on the Continent of Europe, and among other States which have followed the French Code, see *Felix, Droit Intern. Privé*, vol. I. p. 119.

The form in which the rule is stated in *Curtis v. Hutton*, 14 *Vesey's Rep.*, 536 (approved in *Oakey v. Bennett*, 11 *Howard U. S. Supreme Ct. Rep.*, 33, 45, as a clear and precise statement of a doctrine uniformly recognized by the American courts), is this :

The validity of every disposition of real estate depends upon the law of the country in which that estate is situated.

It was held in the case of *Hutcheson v. Peshine* (16 *New Jersey Chan. Rep.*, 167), that the courts of a State will not recognize conveyances of real property within its jurisdiction, in trust for creditors, made without its jurisdiction and under the laws of another State. The rule was stated to rest not only on the acknowledged principle of law applicable to all assignments, voluntary or involuntary, that the title and disposition of real estate are exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which title to it can pass; but upon the further reason, that the laws of one State will not be permitted to control the trust, the action of the trustee, and the disposition of the trust property in another, the subject of the trust being real estate. Citing *Lessee of McCullough's Heirs. v. Roderick*, 2 *Hammond's (Ohio) Rep.*, 380; *Rogers v. Allen*, 3 *Id.*, 488; *Osborn v. Adams*, 18 *Pickering's (Massachusetts) Rep.*, 247.

A mortgage of immovables can only be made according to the law of the place of the property. *Hosford v. Nichols*, 1 *Paige's (New York) Rep.*, 220; and see *Goddard v. Sawyer*, 91 *Massachusetts (9 Allen) Rep.*, 78.

### *Law of movables.*

571. Subject to other provisions of this Part,<sup>1</sup> of the Code, movables are deemed to follow the person of their owner;<sup>2</sup> and the validity and effect of any transaction by him affecting the same, whether by acts between living persons, or by will, depend exclusively upon the law of the place where the transaction is had.<sup>3</sup>

<sup>1</sup> The rule that movables follow the person, says *Story (Conf. of L.*, § 550), is a legal fiction, and yields whenever it is necessary, for the purpose of justice, that the actual situs of the thing shall be examined. It does not authorize the exception to the general rule, that a nation within whose territory personal property is actually situated, has entire dominion over it while therein. Compare, to the same effect, *Green v. Van Buskirk*, 7 *Wallace's U. S. Supr. Ct. Rep.*, 139. See Articles 581, 582, and 583. The indorsements of negotiable paper are, according to Chapter XLVI., another exception.

<sup>2</sup> *Felix (Droit Intern. Privé*, vol. 1, p. 127) cites an almost universal concurrence of authority for the rule that the personal statute governs the movables; and he shows, in note 2, on page 133, that where there is a difference between the domicil and the nationality, the law of the domicil must apply. This interpretation of the rule is more clearly enforced by *Demangeat*, in notes, on page 127 a, 58 b, 53 a, and 132 a.

The rule is universally recognized in the United States. See *Civil Code reported for New York*, § 364. The doctrine is commonly stated substantially as follows:

Personal property has no situs, and a title acquired to it, if good by the law of the domicil, is good everywhere, and will be recognized and enforced in every State, unless it conflicts with its laws or the rights of its citizens. *Marcy v. Marcy*, 23 *Connecticut Rep.*, 308.

*Story*, in discussing the origin of this doctrine, says: "If the law *rei*

*sita* were generally to prevail in regard to movables, it would be utterly impossible for the owner, in many cases, to know in what manner to dispose of them during his life, or to distribute them at his death ; not only from the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing with minute accuracy the law of transfers *inter vivos*, or of testamentary dispositions and successions in the different countries in which they might happen to be. Any change of place at a future time might defeat the best considered will ; and any sale or donation might be rendered inoperative, from the ignorance of the parties of the law of the actual *situs* at the time of their acts. These would be serious evils, pervading the whole community, and equally affecting the subjects and interests of all civilized nations. But in maritime nations, depending upon commerce for their revenue, their power, and their glory, the mischief would be incalculable. A sense of general utility, therefore, must have first suggested the doctrine ; and as soon as it was promulgated, it could not fail to recommend itself to all nations by its simplicity, its convenience, and its enlarged policy." *Story, Conf. of L.*, § 379.

<sup>3</sup> The place of *domicil* is usually the place of the transaction, but where there is a difference between the domicil and the place of the transaction, the tendency of recent opinion seems to be that the law of the place of the transaction should be held to apply in preference to that of the domicil.

"It does not follow," says *Story*, in explaining the rules, that movables are governed by the law of the domicil, "that a transfer made by the owner according to the law of the place of its actual *situs*, would not as completely divest his title ; nor even that transfer by him in any foreign country, which would be good according to the law of that country, would not be equally effectual, although he might not have his domicil there. For purposes of this sort his personal property may, in many cases, be deemed subject to his disposal wherever he may happen to be at the time of the alienation. Thus, a merchant, domiciled in America, may doubtless transfer his personal property according to the law of his domicil, wherever the property may be. But, if he should direct a sale of it, or make a sale of it in a foreign country, where it is situate at the time, according to the laws thereof, either in person or by an agent, the validity of such a sale would scarcely be doubted. If a merchant is temporarily abroad, he is understood to possess a general authority to transfer such personal property as accompanies his person wherever he may be, so always that he does not violate the law of the country where the act is done. The general convenience and freedom of commerce require this enlargement of the rule ; for otherwise the sale of personal property actually situate in a foreign country and made according to the forms prescribed by its laws, might be declared void in the country of the domicil of the owner. In the ordinary course of trade with foreign countries, no one thinks of transferring personal property according to the forms of his own domicil ; but it is transferred according to the forms prescribed by the law of the place where the sale takes place." *Story, Conf. of L.*, § 384. See also *Westlake, Private Intern. Law*, §§ 266-267

It may, therefore, be deemed a more correct statement of the rule, to refer, as in the Article above presented, to the law which governs the *person of the owner* wherever he may be, rather than that of the domicile, or that of his nation, from which he may be absent at the time of the transaction in question.

*Westlake*, (*Priv. Intern. Law*, § 267,) inclines to favor the rule referring to the *situs* of the property, admitting, however, the inconvenience in the case of property, the exact situation of which is unknown. It should seem that the more serious inconvenience of compelling parties to conform to laws which they have no present means of ascertaining, and which they will not, as in the case of ships and lands, generally suppose to apply, is decisive in favor of the rule which refers to the place of the act. The real grounds of the rule referring to the *situs*, namely, the protection of subsequent purchasers or creditors there, are provided for by the Articles of the next Chapter on TRANSFER.

If the rule of the *situs* should be recognized, it might perhaps be defined sufficiently to secure its real object by provisions like the following:

1. Movable property of a foreigner imported into any nation, during its presence in that nation, is with reference to the assignability between living persons, or mode of charging such property, subject to the regulations of the country in which such foreigner has placed it, and which, in these respects, affects the personal property of the members of such nation; and any such assignment *inter vivos*, or charge, will retain its original validity and effect, although the property be subsequently removed to another country. See *Oliver v. Townes*, 2 *Martin's (Louisiana) Rep.*, N. S.,) 93; *Taylor v. Boardman*, 25 *Vermont Rep.*, 581; *Westlake, Priv. Intern. L.*, p. 257, § 272, note (d). See also, generally, *Story, Confl. of L.*, ch. IX.

It was held in *Martin v. Hill*, (12 *Barbour's (New York) Rep.*, 631), that a mortgage upon movables valid where it was made, was valid in another state to which the movables were subsequently carried and by the laws of which such a mortgage would be void as against attaching creditors. The protection of such charges are fully secured by the Articles of this and the next Chapter.

2. If any lien, hypothecation, or other charge has attached to movables by the law of any country where the movables are situated, at the time it attached, so as to affect them in the hands of the owner, the same charge will attach to them in the hands of any transferee, although it has not attached to them according to the previous provisions of this chapter. See *Story, Confl. of L.*, §§ 386-389.

*Local character of public funds and corporate shares.*

**572.** Public funds or stocks, and shares or other interests in, or obligations of, nations or states, or of bodies politic or corporate, or other artificial bodies owing their existence to local laws, are governed in re-

spect to the validity and effect of transactions affecting the same, or property therein, by that law which gives them existence, subject, however, to such further restrictions as are imposed by the law of the place where the same are delivered or transferred.

*Story, Conf. of L.*, § 383.

From the nature of the stock of a corporation, which is created by and under the authority of a State, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that State, and not by the local law of any foreign State. *Black v. Zacharie*, 3 *Howard's U. S. Supr. Ct. Rep.*, 483 ; *Curtis v. Leavitt*, 15 *New York Rep.*, 9.

As to the national character of public funds, see *Commissioners of Charitable Donations v. Devereux*, 13 *Simon's Rep.*, 29, 30.

### *Local character of shipping.*

**573.** Property in shipping is governed in respect to the title thereto, the modes of transfer, or of charging, or otherwise disposing of the same,<sup>1</sup> between living persons,<sup>2</sup> by the law of the nationality of the vessel, as defined by Chapter XX.

<sup>1</sup> In *Hooper v. Guman*, (*Law Rep.*, 2 *Chancery App.*, 282,) it was held that although legal title to a ship must be determined by the law of its nationality, a foreign contract of sale thereof, and the effect of the intervention of the title of a *bona fide* purchaser, for value, in a foreign country, must be governed by the law of the foreign country.

<sup>2</sup> In *Thomas v. Kosciusko* (11 *New York Legal Observer*, 38), it is said that the transmission on the death of the owner is governed by the law of his domicile.

*Story* mentions as another exception, beside those mentioned in the last two Articles, the case of property in custody of the law under revenue acts ; but it may be doubted whether such custody should affect the question of title. It rather relates only to the lien maintained by the government, and a transfer according to foreign law subject to such lien might be valid.

### *Effect of matrimonial settlement.*

**574.** The rights of property in movables, as affected by marriage, are governed by the express contract of the parties, subject to the provisions of Chapter XLVI., on CONTRACTS.<sup>1</sup> Until such contract is made,<sup>2</sup> or to the extent that the contract is inoperative,<sup>3</sup> such rights are regulated by the next article.

<sup>1</sup> *Bishop, on Marriage and Divorce*, 1, § 404 ; *Story, Conf. of L.*, § 184.

<sup>2</sup> The exception must be understood, that the laws of the place where the rights are sought to be enforced, do not prohibit such arrangements. *Story, Conf. of Laws*, § 188.

<sup>3</sup> *Story, Conf. of L.*, § 185 ; *Westlake, Private Intern. Law*, § 372.

*Rights of property of persons married without a settlement.*

**575.** The rights of property in movables, whether owned at the time of marriage or afterwards acquired, as affected by marriage except in respect of succession, are governed by the law of the matrimonial domicile.<sup>1</sup> But upon a change of domicile, the right, as to all subsequent acquisitions, is determined by the law of the new domicile.<sup>2</sup>

<sup>1</sup> *Westlake, Private Intern. Law*, § 366.

<sup>2</sup> *Story, Conf. of L.*, § 187.

*Matrimonial property after change of domicile.*

**576.** After a change by married persons, from the matrimonial domicile, the mutual rights of the husband and wife, acquired subsequently thereto, in each other's movable property, which arise from the marriage relation, and are dependent upon its continuance, are determined by the law applicable to their transactions, or by the law of their new domicile, according to the provisions of this Code, except as otherwise provided by express contract between the parties as to such rights.

This, so far as the law of domicile is concerned, is the American rule. *Story, Conf. of L.*, § 187, (§ 171, b, *et seq.*, *Redfield's ed.*;) and is supported by *Windschied Pankekten*, I., § 35, p. 78, note. To the contrary, *Westlake, Priv. Intern. Law*, § 366, *et seq.* The supposition of a tacit consent, or submission, of the parties to the law of the matrimonial domicile, is certainly open to the objection that, even assuming the parties to have any intention on the subject, there is nothing to show that it was directed to the law of the matrimonial, rather than to that of the subsequent, domicile.

“*Matrimonial domicile*” defined.

**577.** The matrimonial domicile is the domicile first established by the husband and wife together; or, if none such be established, it is that of the husband at the time of the marriage.

See *Story, Conf. of L.*, § 193.

*Abandonment.*

**578.** The matrimonial domicile is not changed by an abandonment of one party by the other.

*Bonati v. Welsh*, 24 *New York Rep.*, 157.

## CHAPTER XLII.

## TRANSFER.

ARTICLE 579. "Transfer," defined.

580. Voluntary transfer.

581. Validity of transfers.

582. Jurisdiction over movables.

583. Protection of creditors.

*"Transfer" defined.*

579. The term "transfer," as used in this Code, means an act of the parties, or of the law by which the title to property is conveyed from one living person to another.<sup>1</sup> It includes the creation and the extinguishment, by such act of an interest in movables or immovables.

<sup>1</sup> *Civil Code, reported for New York, § 458.*

*Voluntary transfer.*

580. A voluntary transfer is a transfer by act of the parties, without compulsion of law, whether with or without consideration.

*Validity of transfers.*

581. Subject to the next two articles, and to the provisions of Chapter XLVI., on CONTRACTS, a transfer of movables, whether voluntary or involuntary, if valid by the law of the place where it is made, is valid everywhere.

Where personal property is seized and sold under an attachment, or other writ, issuing from a court of the State where the property lies, the question of the liability of the property to be sold under such writ, must be determined by the law of that State, though the domicil of all the claimants to the property may be in another State. In a suit in any other State growing out of such seizure and sale, the effect of the proceedings by which it was sold, on the title to the property, must be determined by the law of the State where the proceedings were had. *Green v. Van Buskirk, 5 Wallace's U. S. Supreme Ct. Rep., 307.*

*Jurisdiction over movables.*

582. A transfer of movables, which is prohibited by

the law of the nation within whose exclusive jurisdiction they are situated, is void everywhere.

See Article 571. It may be thought better in lieu of the words "prohibited by", to insert "forbidden by an express provision of".

### *Protection of creditors.*

**583.** A nation may give to any creditors who are subject to its jurisdiction, a lien on movables in possession or in action, situated within its exclusive jurisdiction, in preference to those claiming under a foreign transfer not made in conformity with its own law.

The preceding three Articles are intended to present a simple and uniform rule for determining the validity of foreign transfers of movables. The general rule that the personal statute governs movables, has been discussed under Article 571; and the rule there proposed is in harmony with the above Article 581, which makes the law of the place of the transaction the general rule. This is subject, however, to any prohibition of the positive or customary law of the nation where the movables are situated. *Black v. Zacharie*, 3 *Howard U. S. Supreme Ct. Rep.*, 483; *Warren v. Copelin*, 45 *Massachusetts Rep.*, 594; *Story's Confl. of Laws*, §§ 383-4; *Farrington v. Allen*, 6 *Rhode Island (3 Ames) Rep.*, 449; *Parsons v. Lyman*, 30 *New York Rep.*, 103; *Caskie v. Webster*, 2 *Wallace Jr. U. S. Circ. Ct. Rep.*, 131.

A transfer made at the domicile of the maker, and efficient to transfer his property there, does not transfer his movables situated in another State by the law of which such transfer is regarded as inconsistent with public policy. *Varnum v. Camp*, 1 *Green (New Jersey) Rep.*, 326.

The rule that personal property shall be transferred according to the law of the domicile of the owner, and not the law of the *rei sitæ*, does not apply when the rights of residents in the State where the property is situate will be affected by it. *Moore v. Bonnell*, 2 *Vroom (New Jersey) Rep.*, 90; *Bentley v. Whittemore*, 18 *New Jersey Chan. Rep.*, 366.

The exception for the protection of creditors stated in the above Article, turns, not on the validity of the transfer, but on the superior power of a State, acting through its courts, to apply property within its limits to the satisfaction of debts due to its citizens.

The customary law of a State where movables are situated, in reference to the formalities attending a transfer, will not be applied by the tribunals of such State against a transfer valid by the law of the place where the maker was domiciled and all the parties to the controversy are domiciled, if the defect of form does not prejudice the citizens of the State where the movables are situated. *Noble v. Smith*, 6 *Rhode Island (3 Ames) Rep.*, 446.

A transfer of movables situate in one State, made between persons domiciled in another State, which is valid by the law of the place of domicile, may be treated as valid against other persons domiciled in the same State, although it is defective in point of form according to the



law of the State in which the movables are situate. See *Rhode Island Central Bank v. Danforth*, 80 *Massachusetts* (14 *Gray*) *Rep.*, 123.

Where there is a conflict between the laws of different States, all that a debtor can reasonably be required to do is to make his assignment in good faith, and in accordance with the law of the State in which he lives and where the principal part of his property is situated. The courts of such State will give effect to the assignment on all the property within their jurisdiction, though it may be inoperative as to real property in another State. *Trink v. Buss*, 45 *New Hampshire Rep.*, 325.

In *Pardo v. Bingham*, (*Law Rep.*, 6 *Equity Cas.*, 485,) it was held that the English courts should not give priority over all other creditors, to a claim against an Englishman, secured to a foreign creditor by an instrument, which, by being registered pursuant to the foreign law, was entitled by that law, to such priority.

In the case of *South Boston Iron Company v. Boston Locomotive Works & Trustee*, (51 *Maine Rep.*, 585,) this principle was extended to protect the claim of a *foreign creditor*, who was a citizen of the State where the discharge was granted, but, *who, by the law of the State*, where the question arose and assets were attached, was entitled to proceed against such assets as well as if he were a citizen.

The enforcement of the lien, given by this Article, is provided for by Part VI., on the ADMINISTRATION OF JUSTICE.

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## CHAPTER XLIII.

### SUCCESSION.

ARTICLE 584. "Succession" defined.

585. Law governing succession to movables.

586. Law governing succession to immovables.

587. Rights of succession, when not affected by foreign character of property.

588. Incidents of local burdens.

589. Failure of heritable blood.

*"Succession" defined.*

**584.** The term "succession," as used in this Code, means the coming in of another to take the property of one who dies without disposing of it by will.

The term "descent," hitherto chiefly used in the law of England and of the United States to denote the devolution of an inheritance, was derived from the ancient principle of the English law that an inheritance could never ascend and pass from son to father, but must descend or pass to descendants.

But as most laws now allow property to pass in both ways, there arises an incongruity which causes practical embarrassment, since the

word "descendants" must still be confined to its strict meaning, and can not embrace all those who may take by the statute of descents, so called, and the word "descend" must often be used in a sense opposite to the devolution of property in the ascending line. The term "succession" is the more appropriate phrase of the civil law. This is, therefore, adopted to denote the transmission of property of a decedent by operation of law. *Civil Code, reported for New York, § 637.*

*Law governing succession to movables.*

**585.** The succession to the movable property of one who dies intestate as to such property, is governed exclusively by the law of the place which was the domicile of the intestate at the time of his death.

*Moultrie v. Hunt, 23 New York Rep., 394; Wicker v. Hume, 7 House of Lords, 124; Doglioni v. Crespini, House of Lords, 1 Eng. & Irish App. Cas., 301.*

"This," says *Story*, in *Harvey v. Richards*, (1 *Mason's Rep.*, 381, 408,) "although once a much vexed question, is now so completely settled by a series of well considered decisions that it can not be brought into judicial doubt." (Citing numerous Continental, English and American authorities.) The reason of the rule is to avoid the uncertainty and confusion which would result from applying any other to the case of a person having property in several jurisdictions, or dying away from his domicile.

Chancellor *Kent* states the doctrine thus :

"There has been much discussion as to the rule of distribution of personal property, when the place of the domicile of the intestate and the place of the situation of the property were not the same. But it has become a settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to, and distribution of, personal property wherever situated, is governed by the law of the owner's or intestate's domicile, at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated. On the other hand, it is equally well settled, in the law of all civilized countries, that real property, as to its tenure, mode of enjoyment, transfer and descent is to be regulated by the *lex loci rei sitæ*." 2 *Kent's Commentaries*, 429.

"Whether personalty in one country becoming the property of a person who is in another country, and who there becomes insolvent, goes to the executor in the former country, or to the assignees in insolvency in the latter, depends upon the question in which country he had his domicile." *Re Blithman, Law Rep., 2 Equity, 23.*

"The rule that movable property in one jurisdiction, of a person domiciled at the time of death in another jurisdiction, is distributed according to the law of the latter, is subject to the limitation that the question of what is and what is not his property may be determinable by another law ;—e. g., that of the matrimonial domicile." *Townes v. Durbin, 3 Metcalfe (Kentucky) Rep., 352.*

*Law governing succession to immovables..*

**586.** The succession to the immovable property of one who dies intestate as to such property, is determined exclusively by the law of the place in which the immovables are locally situated.

See note to previous Article. Convention between France and Austria, December 11, 1866, 9 *De Clereq.* 675.

*M. Helbrouner*, in commenting on a preliminary draft of this Chapter, (*Bullet. de la Soc. de Legis. Comp.*, No. 2, Avril, 1869, p. 26,) objected that in the matter of Wills, &c., the chapter seemed only to refer to the conflicts possible between English and American laws, by the division of inheritances into real and personal estates, a division unknown to the legislation of the European Continent.

Since, however, these distinctions exist in some countries, an International Code which does not propose to interfere with them, should provide for their being observed in the administration of questions to which they may properly apply.

The rule that a distinction is to be made between movables and immovables, in respect of succession, the law of the domicile applying to the former, and the law of the place where the property is situated applying to the latter, seems to be supported by the greater concurrence of authorities.

*Felix*, however, cites many distinguished authors as favoring a different rule, which may be stated as follows :

The succession to all the property, whether movable or immovable, of a person, who dies intestate as to such property, is governed by the law of the place which was the domicile of the decedent at the time of his death, unless there be some prohibitory law in the place where immovable property is situated, and except such immovable property as by the law of its place has a special quality impressed upon it determining its devolution. *Felix, Droit International Privé*, vol. 1, pp. 140-147.

*Rights of succession, when not affected by foreign character of property.*

**587.** When a person dies intestate leaving foreign immovables, the right of succession to his movables will not be controlled or affected by any conditions which would attach to the right, if the immovables had been situated in the country of his domicile; nor will the right of succession to the immovables be controlled or affected by any conditions which would attach to that right, if the movables had been situated in the same country with the immovables.

*Balfour v. Scott*, 6 *Brown's Parly Rep.*, (by *Tomlin*), 731, cited in *Story, Confli. of L.*, § 486.

*Incidents of local burdens.*

**588.** Any local burden which would primarily fall upon the immovables of an intestate, according to the law of the place where such immovables are situated, will retain such order of incidence, although, according to the law of his domicil, such burden would fall primarily upon his movables.

Drummond v. Drummönd, 6 *Brown's Parly Rep.*, 550, (by Tomlin,) cited in *Story, Confl. of L.*, § 487.

*Failure of heritable blood.*

**589.** The property, whether movable or immovable, of a foreigner who dies intestate in respect thereto, and leaves no person capable of succeeding according to the rules prescribed in articles 585 and 586, accrues to the nation or state within whose jurisdiction such property is locally situate, subject to the payment of debts, and, after that, to such rule of distribution as may be adopted by that nation or state.

This Article is suggested by the case of the Public Administrator v. Hughes, 1 *Bradford's Surrogate (New York) Rep.*, 125, 130.

## CHAPTER XLIV.

## WILL.

## ARTICLE 590. "Will" defined.

591. Will of movables.

592. Testamentary capacity as to movables.

593. Qualification of preceding Articles.

594. Testamentary capacity as to immovables.

595. Probate, when necessary.

596. Construction or interpretation of will.

*"Will" defined.*

**590.** The term "will," as used in this Code, includes all testamentary acts.

*Will of movables.*

**591.** A will of movables is valid everywhere in respect to form and execution, if it be valid in respect

thereto by the law of the place where it was executed, or by the law of the place which was the testator's domicile either at the time of its execution or at the time of his death.

This rule is new, though not without sanction. It is founded upon the unreasonableness of requiring persons sojourning abroad to have their wills drawn in conformity to the law of their domicile, of which the means of information may not be at hand; the hardship of affixing to a change of domicile the legal consequence of the revocation of a will made in the former domicile, and the inconvenience of requiring a new execution upon a change of domicile.

It is not the rule applied by the American courts generally, but is more in harmony with the spirit of the civil law. *Irwin's Appeal*, 33 *Connecticut Rep.*, 128.

It seems to be a sufficient safeguard to the solemnities necessary to a valid testament, that the testator should respect and fulfill the requirements of either of the systems of local law which may reasonably be supposed by him to be applicable to his case. This rule is, however, restricted to wills of movables.

Such a relaxation of the existing rule was suggested as a reasonable and proper one, by the Chancellor of New York, in the matter of *Roberts*, 8 *Paige (New York Rep.)*, 519, and is sustained by *Schultz v. Dambmann*, 3 *Bradford's Surrogate (New York Rep.)*, 379.

In 1856 a statute was passed in the State of Connecticut, enacting that a will whether of real or personal estate, executed according to the formalities required by the law of the country within which it is executed, shall be valid to pass such property wherever situate. This rule is understood to have been approved by experience, and has been in force there ever since. The same has been adopted in some other of the United States.

The general rule of English and American courts, as laid down in *Moultrie v. Hunt*, 23 *New York Rep.*, 394, may be stated as follows:

The validity of a will of movables, in respect of form, is determined solely by the law of the place which was the testator's domicile at the time of his death.

*Story* states this rule as settled; and adds, that, if void by that law, the will is void everywhere, although it fulfills the requisites of the law of the place where assets are situated. *Story, Conf. of L.*, § 467.

There is much to be said, however, against this rule; and perhaps the doctrine, better supported by the existing authorities, is that, a will valid in form is not revoked, nor is its interpretation altered by a subsequent change of domicile of the party, unless expressly stated to be revoked thereby. *Félix, Droit Intern. Privé*, nos. 117, 77.

"It can never be imagined that by his transference of his domicile to England, the testator intended tacitly to revoke his will, more especially since by the continental law, with which alone from his previous life he can be supposed to be acquainted, such transference would not have that effect." *Westlake, Private Intern. Law*, p. 326.

The act of 24 and 25 *Vict.*, c. 114, §§ 2, 3, adopts the principle, that, a will executed by a British subject according to the law of that part of the United Kingdom where it was made, is valid without reference to the domicile of the testator at the time of making, or of death; and that the validity or construction of a will is not affected by any subsequent change of domicile. Whether a marriage in a new domicile can affect it, may be doubtful. *Matter of Reid*, *Law Rep.*, 1 *Probate & Divorce*, 74.

*Testamentary capacity as to movables.*

**592.** The law of the place which was the testator's domicile at the time of his death, determines both his capacity to make a will of movables, and his disposable power over the movables.

*Schultz v. Dambmann*, 3 *Bradford's Surrogate (New York Rep.)*, 379; *Exp. McCormick*, 2 *Id.*, 169; *Story, Conf. of L.*, § 465.

*Qualification of preceding Articles.*

**593.** The provisions of articles 591 and 592 are subject to the right of every nation to regulate the object of testamentary gifts of movables, as well as immovables, within its territory, by positive laws.

*Story, Conf. of L.*, § 472. The creation of trusts, and other matters relating to the substance of the disposition, are to be governed of course by the local law.

*Testamentary capacity as to immovables.*

**594.** The law of the place where immovable property is situated determines the capacity of the testator to make a will of such immovables, the extent of his power to dispose of the property, the form and execution of the will, and the solemnities necessary to give it effect.

*Story, Conf. of L.*, § 472. This is stated to be the common law rule, and one supported by great weight of authority of foreign jurists, although they are not entirely agreed upon it.

According to the case of *White v. Howard*, 52 *Barbour's (New York Rep.)*, 294, this rule includes the application of such local laws as limit bequests and devises for certain uses to a portion of the testator's estate.

*Probate, when necessary.*

**595.** A will proved in one nation or state, is not sufficient to pass immovables situate in another, unless admitted to probate in the latter, according to its laws.

*Crusoe v. Butler*, 36 *Mississippi*, (7 *George*,) *Rep.*, 150, citing *McCormick*

*v. Sullivan*, 10 *Wheaton's U. S. Supr. Ct. Rep.* 202; *United States v. Crosby*, 7 *Cranch U. S. Supr. Ct. Rep.*, 115; *Kerr v. Moon*, 9 *Wheaton's U. S. Supr. Ct. Rep.*, 565; *Carmichael v. Elmendorf*, 4 *Bibb (Kentucky) Rep.*, 484; *Cornelison v. Browning*, 10 *B. Monroe (Kentucky) Rep.*, 428.

But letters are not necessary in the latter state, unless the execution of the power conferred by the will depends upon them. As to real property not assets, the probate is only authenticated evidence, and not the foundation of the executor's title. *Crusoe v. Butler*, 36 *Mississippi, (7 George,) Rep.*, 150.

### *Construction or interpretation of will.*

**596.** The interpretation of a will, whether of movables or immovables, depends upon the law of the place where it was made, unless a different intent appears on the face of the instrument, either from its being made in a foreign language, or from other circumstances.

The rule, as generally laid down, refers to the law of the domicile of the testator for the interpretation of his will. *Parsons v. Lyman*, 4 *Bradford's Surrogate (New York) Rep.*, 268; *Anstruther v. Chalmer*, 2 *Simon's Rep.*, 1; *Yates v. Thomson*, 3 *Clark & Finnelly's Rep.*, 544; *Isham v. Gibbons*, 1 *Bradford's Surrogate (New York) Rep.*, 69; *Demangeat* in notes to *Fablia, Droit Intern. Privé*, vol. 1, 130, note b.

On this point the following rules may be extracted from the principles discussed and laid down by *Story* :

A will of movables must be interpreted according to the law of the testator's domicile at the time of the actual making of the will. *Story, Conf. of L.*, § 474, *a, f.*

The question whether or not a testator intended to devise real estate or immovables by his will, or as to what is included in the words "real estate," "immovables," or the like, must be determined by the same law. *Id.* § 479, *a.*

So, also, of the interpretation to be put upon the words of description of a person or a class of persons mentioned by a testator. *Id.*, § 479, *e.*

But it seems a more reasonable rule, and one in harmony with the principles embodied in the preceding Articles, to make the interpretation of the language dependent upon the law of the place where such language was used, rather than on that of the testator's domicile.

## TITLE XXVI.

## OBLIGATIONS.

- CHAPTER** XLV. Obligations in general.  
XLVI. Contracts.  
XLVII. Obligations imposed by law.  
XLVIIa. International bills of exchange.
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## CHAPTER XLV.

## OBLIGATIONS IN GENERAL.

- ARTICLES** 597. "Obligation" defined.  
528. Obligation, how created.  
599. When an obligation accrues.  
600. Certain contracts excepted.

*"Obligation" defined.*

**597.** The term "obligation," as used in this Code, means a legal duty by which a person is bound to do or not to do a certain thing.

*Civil Code, reported for New York, § 670.*

*Obligation, how created.*

**598.** An obligation arises either from,

1. The contract of the parties ; or,
2. The operation of law.

*Civil Code, reported for New York, § 671.*

*When an obligation accrues.*

**599.** The time when an obligation accrues is determined by the law of the place where it arises.

*Gassaway v. Hopkins, 1 Head (Tennessee) Rep., 583.*

*Certain contracts excepted.*

**600.** The provisions of this Title have no application to marriage, nor to contracts relating to immovables,<sup>1</sup> in so far as they relate thereto.



<sup>1</sup> It has, however, been held that a contract made and to be performed in S., for the discharge of a debt secured by a mortgage on an immovable in D., is governed as to its interpretation, and the appropriation of payments made under it, by the law of the place of the contract. "The mere fact of the money having been advanced on a mortgage in a foreign country, does not render it requisite that the contract should be governed by the law of that country in which the mortgaged land is situate." *Campbell v. Dent*, 2 *Moore's Privy Council Rep.*, 292, 307, 308; *Westlake, Private Intern. Law*, § 229.

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## CHAPTER XLVI.

### CONTRACTS.

#### SECTION I. Law of place.

##### II. Place of making contract.

##### III. Formalities.

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## SECTION I.

### LAW OF PLACE.

**ARTICLE 601.** Contracts made and performed in same nation.

602. Contracts made and performed in different nations.

603. Law governing interpretation of contract.

604, 605. Illegality of contract.

606. Mode of charging parties to negotiable instruments.

#### *Contracts made and performed in same nation.*

**601.** A contract made and agreed expressly or tacitly,<sup>1</sup> to be wholly performed within the jurisdiction of the same nation, is governed by the law of that nation.

<sup>1</sup> *Story, Conf. of L.*, § 280. This rule of municipal law requires to be mentioned as a rule of international law, not only because the contracting parties may be foreigners, but because the effect of such a contract even when made between members of the nation is frequently drawn in question abroad, in respect to the rights of foreigners. *Benness v. Clemens*, 8 *Pennsylvania State Rep.*, 24.

*Contracts made and performed in different nations.*

**602.** Subject to articles 604 and 605, a contract made within the jurisdiction of one nation, and agreed expressly or tacitly to be performed either wholly or partly within the jurisdiction of another, is governed as to its validity<sup>1</sup> by the law of the place where it is made;<sup>2</sup> and as to its interpretation by the law actually or presumptively intended by the parties for that purpose; as provided in the next article.

<sup>1</sup> The expression "existence" of a contract has been sometimes recommended in preference to the terms "validity" or "illegality," for the reason that an invalid or unlawful contract "is no contract at all." (*Coppocks v. Brower*, 4 *Meeson & Wellesby's Rep.*, 368.) "It must be a legal contract or it is nothing." *Washburn v. Franklin*, 28 *Barbour (New York) Rep.*, 28. So a fraudulent transaction as between the parties "in contemplation of law . . . never had any existence at all." *Bottomley v. United States*, 1 *Story U. S. Circ. Ct. Rep.*, 147. This reasoning, however, does not appear to be entirely satisfactory; for in ordinary language an agreement between parties is a contract in conscience, though not a contract in law.

<sup>2</sup> Many cases might be cited as holding in general terms that the validity or existence of a contract depends on the law of the place of performance. But no case has been found holding, for instance, that the contract of two infants of the age of 15 years, made in New York, to be wholly performed in a country where at that age they would be considered adults, is a valid contract.

The main exception to this principle is found in the cases on usury, which lay down the rule that the law of the place of performance is to govern; so that, if payment is to be made in another country, the rate prescribed by the law of either country may be stipulated for, even when the law of the place of making the contract prescribes a lower rate than that allowed in the place of payment. *Andrews v. Pond*, 13 *Peters' (U. S. Supreme Ct.) Rep.*, 65; *Pecks v. Mayo*, 14 *Vermont Rep.*, 38; *Cope v. Allen*, 53 *Barbour (New York) Rep.*, 350; 2 *Kent's Commentaries*, 461; 2 *Parsons on Contracts*, 585, note *n*; *Story, Conf. of L.*, § 296; *Savigny and Fœlix*, as cited by *Westlake, Private Intern. Law*, § 205.

When the rate allowed in the place of making the contract is higher than at the place of performance this question does not arise. Such a contract at the rate allowed by either law is, of course, valid. *Depau v. Humphreys*, 8 *Martin, Louisiana, (N. S.)* 1; 2 *Kent's Commentaries*, 461, note *b*; *Balme v. Wombough*, 38 *Barbour (New York) Rep.*, 352; *Richards v. Glove Bank*, 12 *Wisconsin Rep.*, 692; *Vliet v. Camp*, 13 *Id.*, 198; *Fisher v. Otis*, 3 *Chandler (Wisconsin) Rep.*, 83.

The point decided in the case of the Commonwealth of Kentucky *v. Bassford*, 6 *Hill (New York) Rep.*, 438, was that a contract made and to be performed beyond the State of New York in relation to a foreign lottery, if lawful where made, will be enforced in New York, though if

made in New York, it would be unlawful. *Thatcher v. Morris*, 11 *New York Rep.*, 438.

The dictum of Lord MANSFIELD, in *Robinson v. Bland*, 2 *Burrows Rep.*, 1077, evidently has reference to the cases provided for in Article 604.

So the validity of a voluntary assignment of movables in trust is governed by the law of the place of its origin. *Speed v. May*; 5 *Harris (Pennsylvania) Rep.*, 91; *Law v. Mills*, 6 *Id.*, 185; but some exceptions have been made, 6 *American Law Reg.*, (N. S.), 522.

It is not enough that the parties have in view a reference to the law of another State in the formation of their contract; for, if that were sufficient the statute of usury would in every case at the option of the parties become a dead letter. The rule is that the parties must have a view to the laws of another State in the execution of the contract, and then undoubtedly the contract is to be governed by such foreign law. *Kent, J. Van Schaick v. Edwards*, 2 *Johnson's Cases*, (New York,) 367.

This familiar and fundamental rule is stated by most authorities as a consequence of the independent sovereignty of States, but it has been well expounded in a recent case with reference to the principle which is also essential to it; that men ought to be safe from civil loss and criminal liability if they conform to the laws of the place where their acts are done. An act to be punishable as an offense must be a crime where it is performed. A person who is about to enter into a contract ought to have an opportunity to take legal advice. This privilege he would be in a great measure deprived of unless he can apply to members of the legal profession in the place where the contract is to be made, and they would naturally instruct him in that law with which they are familiar. *Koster v. Merritt*, 32 *Connecticut Rep.*, 246.

### *Law governing interpretation of contract.*

**603.** The law intended by the parties to govern the interpretation of any <sup>1</sup> stipulation of their contract is deemed to be:

1. The law of any nation named by them for that purpose, as a part of their contract; or,<sup>2</sup>

2. If no such law is so named, the law of the place where such stipulation is agreed to be wholly<sup>3</sup> performed; or,<sup>4</sup>

3. If no such law or place of performance is specified, the law of the place of making their contract;<sup>5</sup> but in this case a contrary intention may be shown.<sup>6</sup>

<sup>1</sup> Where there are several stipulations to be performed in several places, the law of the place of performance of one does not govern as to another. *Pomeroy v. Ainsworth*, 22 *Barbour (New York) Rep.*, 128.

It seems that English subjects on their marriage may stipulate that their marriage rights shall be regulated by the law of a foreign country; and the courts of England will enforce such a contract. *Este v. Smith*, 23 *Law Journ. Chanc.*, 705.

"It has been held in Louisiana that a matrimonial contract which would adopt a law foreign to the domicile must set out its provisions, and not merely refer to the law *eo nomine*. *Bourcier v. Lanusse*, 3 *Martin (Louisiana) Rep.*, 581. But a contrary opinion has been expressed in *Este v. Smith*, 18 *Beavan's Rep.*, 122." (*Westlake Private Intern. Law*, § 371; citing also, *Byam v. Byam*, 19 *Beavan's Rep.*, 58.)

In *Millar v. Heinrick*, 4 *Campbell Rep.*, 155, a Russian contract for seaman's wages payable monthly "subject to the deductions provided for by the regulations of the Russian marine" was held to be governed in that respect by the law so mentioned.

<sup>2</sup> *Cook v. Moffat*, 5 *Howard U. S. Supr. Ct. Rep.*, 312; *Van Schaick v. Edwards*, 2 *Johnson's Cases*, (*New York*), 367. KENT, J.

"Cases may be readily conceived where it might be difficult to determine whether the parties had reference to the laws of the place where the contract was made or some other place. . . . In such cases it is desirable that the parties should be at liberty to determine by express stipulations made in good faith by which law the rate of interest shall be governed." *Townsend v. Riley*, 46 *New Hampshire Rep.*, 312.

"The law of the place," [*i. e.* of making,] "can never be the rule where the transaction is entered into with an *express* view to the law of another country as the rule by which it is to be governed. *Huberi Prælectiones*, 1, 3, p. 34, are clear and distinct. *Voet* speaks to the same effect."

"That it was competent for the parties, being citizens of Illinois, to provide by their express agreement that it should be . . . construed by the laws of the State is too well established by authority to admit of doubt." (2 *Burrow's Rep.*, 1077.) *Strawbridge v. Robinson*, 5 *Gilman (Illinois) Rep.*, 470. *Parsons on Notes & Bills*, I., p. 57:

It is the frequent practice in America to mention the law by which all questions of interpretation of a contract shall be determined.

<sup>3</sup> See, *Westlake, Private Intern. Law*, nos. 212, 216.

A policy of marine insurance made in England, although on a foreign voyage, *i. e.*, from England abroad, is to be interpreted as to all matters contemplated in it, as an English contract. *Dent v. Smith*, *Law Rep.*, 4 *Queen's Bench*, 414; and see *Peninsular & Oriental Co. v. Shaw*, 3 *Moore's Privy Council Rep.*, (*N. S.*) 272; *Hale v. N. J. Steam Navigation Co.*, 15 *Connecticut Rep.*, 546-7.

See *Story, Confli of L.*, § 280, to the contrary.

<sup>4</sup> *Story*, § 280; *Penobscot, &c., R. v. Bartlett*, 78 *Massachusetts* (12 *Gray*) *Rep.*, 248; *Cox v. United States*, 6 *Peters' U. S. Supreme Ct. Rep.*, 172; *Bank of United States v. Daniel*, 12 *Id.*, 32; *Bell v. Bruen*, 1 *Howard U. S. Supr. Ct. Rep.*, 169; *Kanaga v. Taylor*, 7 *Ohio State Rep.*, (*N. S.*) 142; *Pryor v. Wright*, 14 *Arkansas Rep.*, 189; *Gaylord v. Johnson*, 5 *McLean U. S. Circ. Ct. Rep.*, 448; (as to grace,) *Bowen v. Newell*, 13 *N. Y. Rep.*, 290; (as to usury,) *M'Allister v. Smith*, 17 *Illinois Rep.*, 328; (as to interest,) *Hawley v. Sloo*, 12 *Louisiana Ann. Rep.*, 815; (as to amount of interest,) *Vincent v. Platt*, 21 *Georgia Rep.*, 135; 2 *Parsons on Notes & Bills*, 320; *Mason v. Dousay*, 35 *Illinois Rep.*, 424.

<sup>5</sup> The rule of comity adopts the law of the country where the contract

is made, in determining its nature, construction and validity, unless such construction is *contra bonos mores*, or against some positive law of the place where the contract is sought to be enforced.

Lloyd v. Ginbert, *Law Rep.*, 1 *Queen's Bench*, 115. *Forsyth's Cases & Opinions in Constitutional Law*, p. 239.

It can have no validity except conformable to the law where made. *The Baltimore & Ohio R. R. Co. v. Glenn*, 28 *Maryland Rep.*, 287.

No right can be derived under any contract, made in opposition to the law where it is made. *Hall v. Mullin*, 5 *Harris & Johnson (Maryland) Rep.*, 193.

But where a question arises under the common law or law merchant, the courts of one State will not be concluded as to what the common law rule in such case is, by what the courts of the State where the contract was made have decided in relation thereto. Otherwise if the decision was upon a question arising under some custom or usage of the place where the contract was made.

*Franklin v. Twogood*, 25 *Iowa Rep.*, 520.

<sup>6</sup> Perhaps other modes of indicating the intent should be allowed to provide for cases like the following : (1) A contract made between foreigners in their foreign language ; *Fœlix, Droit Intern. Privé*, vol. 1, 158, *d* ; (2.) A contract, subsidiary or incidental to a foreign right or obligation ; as, a contract made by a manufacturer in one country, to supply goods in another to enable the other party to fulfill a contract to be performed in a third country ; or a contract in one country to give a release in another from a foreign obligation, which would mean a release good by the foreign law ; or, a contract in *A.* to make another contract in *B.* for doing an act in *C.* ; (3.) A contract where the subject relates locally to a foreign country. *Robinson v. Bland*, 2 *Burrows Rep.*, 1078, 1079.

### *Illegality of contract.*

**604.** A contract, wherever made or to be performed, which is forbidden by an express provision of the law of any nation within whose jurisdiction it is agreed to be wholly or in part performed,<sup>2</sup> is unlawful everywhere,<sup>3</sup> so far as relates to the prohibited performance.

<sup>1</sup> "What is injurious to the rights of the citizens where the property is situated should be the subject of positive legislation, and not left to the discretion of the courts : (*Story, Confli. of L.*, § 390 :) and so are the authorities generally in the United States, although the rule is somewhat more broadly expressed. *Zipsey v. Thompson*, 1 *Gray (Massachusetts) Rep.*, 243 ; *Vernam v. Camp*, 1 *Green (New Jersey) Rep.*, 326 ; 2 *Mason, U. S. Circ. Ct. Rep.*, 157 ; 5 *Greenleaf*, 245 ; *Oliver v. Townes*, 2 *Martin (Louisiana) Rep.*, 97 ; *Guillander v. Howell*, 35 *New York*, 657.

An express provision of law that a voluntary assignment in trust made abroad, of a debt, due by a resident, shall not be effectual in the debtor's residence unless recorded there, as against a *bona fide* subsequent purchaser, will render the assignment invalid to that extent. *Philson v. Barnes*, 50 *Pennsylvania State Rep.*, 230.

<sup>2</sup> *Story, Conf. of L.*, § 244, 32 ; *Varnum v. Camp*, 1 *Green (New Jersey) Rep.*, 326.

<sup>3</sup> 1 *Fœlix Droit Intern. Privé*, p. 236. (Citing *Pothier des Assurances*, No. 58, and note (a.) by *Demangeat*.) Other authorities make the contract unlawful only in the courts of the nation whose law is violated.

*The same.*

**605.** A contract, wherever made or to be performed, which is made with the intent to violate an express provision of this Code, or of the law of any nation a party to this Code, is unlawful everywhere.

*Westlake on Private International Law*, §§ 196, 200 ; *Banchor v. Mansel*, 47 *Maine (3 Hubbard) Rep.*, 58.

*Mode of charging parties to negotiable instrument.*

**606.** Except as otherwise provided in Chapter XLVIIA, the holder of a negotiable instrument, at its maturity, may charge any other party thereto by performing the act required by the law either of the place where it is payable, or of the place where the party, sought to be so charged, contracted ; and every party other than such holder may charge any of his predecessors by acting according to the law of the place where his own contract was made, or where the instrument is made payable.

The rule stated in the text was applied in *Hirschfeld v. Smith*, 35 *Law Journ. (N. S.) C. P.*, 177 ; *Law Rep.*, 1 *C. P.*, 340, in the case of an indorser, as well on the previous authority, as on the ground that notice required by the law of the place of payment must be deemed reasonable. " The inconvenience would be great if the holder was bound to know the place of each indorsement and the law of that place relating to notice of dishonor, and to give notice accordingly." *Parsons* (2 *Notes & Bills*, 341, note) confirms this view, and further says : that, as the indorser must have intended that the protest should be made by a notary of the place of dishonor, it must have been also understood that the notary should act according to his own law. Besides this, a notary, though knowing the place where an indorsement was made, might not be able to ascertain the requirements of the law of that place.

The weight of American authority, however, is in favor of the place of perfecting the indorsement.

In *New York*, in *Aymar v. Sheldon*, 12 *Wendell (New York) Rep.*, 439, an indorser there of a West India bill, drawn on France, was held liable on its non-acceptance, although the French law would not make him liable until non-payment. So, as to the necessity of giving notice of protest, see *Artisans' Bank v. Park Bank*, 41 *Barbour (New York) Rep.*, 599 ; or of exhausting the remedies against the maker, *Lee v. Sellick*, 33 *New York Rep.*, 615 ; see also *Short v. Trabue*, 4 *Metcalfe (Kentucky) Rep.*, 299 ; *Rose*

*v. Park Bank*, 20 *Indiana Rep.*, 94; *Raymond v. Holmes*, 11 *Texas Rep.*, 54.

By the present rule, where a bill is drawn in one state and indorsed in another, and accepted and dishonored in a third, the rights of the holder can only be secured by a compliance with the laws of the three, and so as to every other foreign and independent state. *Thorp v. Craig*, 10 *Iowa (2 Withrow) Rep.*, 461.

See further on this head articles 620, a, and following.

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## SECTION II.

### PLACE OF MAKING CONTRACT.

**ARTICLE 607.** "Place of making contract" defined.

608. Contract made by several parties in different places.

609. Special agreement as to place of consummating contract.

610. Presumed place of making contract.

611. Implied contracts.

612. Presumption as to place of indorsement of negotiable paper

613. Estoppel.

*"Place of making contract" defined.*

**607.** The "place of making" an express contract, within the meaning of this Code, is the place where the intention of the party, to whom the offer to contract is made, is first completely manifested, as follows.

1. If manifested by sending a written or oral statement of such acceptance to the party making the offer, at the place from which the statement is sent ;<sup>1</sup>

2. If manifested without a statement of acceptance, either by performing the essential terms of the offer, or by receiving the consideration offered, at the place where such performance or receipt occurs ;<sup>2</sup>

3. If manifested through an agent authorized by the party to whom or in whose favor the offer is made to bind him by declaring the intention of such agent to accept it, at the place where the agent makes such declaration.<sup>3</sup>

<sup>1</sup> Where a preliminary chaffering in North Carolina was followed by delivery of the money lent, and receipt of the note therefor, both occur-

ring in Georgia, the contract of loan and note were held to be made in Georgia. *Davis v. Colman*, 11 *Iredell (North Carolina) Rep.*, 303. *Cases and Opinions in Constitutional Law*, by *Forsyth*, p. 244.

The place of delivering an indorsement written elsewhere is the place of making it. *Young v. Harris*, 14 *B. Monroe (Kentucky) Rep.*, 559; *Pine v. Smith*, 11 *Gray (Massachusetts) Rep.*, 38.

<sup>2</sup> In *Parken v. Royal Exchange Ass. Co.*, 8 *Session Cases*, 2nd *Series*, 372, a life insurance policy was applied for by a domiciled Scotchman on the life of another Scotchman. The application was made by him in Scotland to the defendant's agent there. The defendant sent the desired policy from its head office in London completely executed to its Scotch agent for delivery in Scotland to the applicant, which was done, the agent not doing or being authorized to do anything else to bind the company. The court held that the acceptance of the offer to contract was made in England; that the delivery of the policy in Scotland was not a new offer made there, but the completion of the notification of an acceptance made in England; and that the implied authority of its agent in Scotland to withhold delivery there, if anything material had come to his knowledge, (p. 371,) did not change the place of making the contract from England to Scotland. A similar state of facts arose in *Wright v. Insurance Companies*, 6 *Am. Law Register*, 489, and was decided in the same way.

<sup>3</sup> If goods are sent by the seller in one state to the purchaser in another, in pursuance of an order, the purchaser's contract to pay is deemed made where accepted by dispatching the goods. *Woodbridge v. Allen*, 53 *Massachusetts Rep.*, 470; *Kline v. Baker*, 99 *Id.*, 255.

So, goods sent by a principal from a place where his agent to procure orders only has sent him such an order, is made at the place whence the merchandise, not the order was sent. *Woolsey v. Bailey*, 7 *Foster (New Hampshire) Rep.*, 217; *Smith v. Smith*, 7 *Id.*, 244.

<sup>4</sup> The distinction between a messenger and an agent in the strict sense, is that while each of them communicates a declaration of intention meaning to bind not himself but his principal, yet it is only the agent who declares what his own will is. The messenger declares what his sender's will is. *Windscheid Pandekten*, I., § 73.

<sup>5</sup> *Westlake, Private Intern. Law*, §§ 212, 221; 1 *Felix, Droit Intern. Privé*, § 105, p. 244.

Thus a life insurance policy was applied for in Illinois to the agent there of a New York company, sealed by the company in New York, but conditioned not to be binding until countersigned by the Illinois agent and the premium paid to him. The place of making the contract was held to be Illinois and not New York. *Pomeroy v. Manhattan Life Insurance Co.*, 40 *Illinois Rep.*, 398; *Heebner v. Eagle Ins. Co.*, 10 *Gray (Massachusetts) Rep.*, 131; *Daniels v. Hudson River Ins. Co.*, 12 *Cushing (Massachusetts) Rep.*, 422, 423. The contrary was held in *Huth v. New York Mutual Ins. Co.*, 8 *Bosworth (New York) Rep.*, 551.

*Contract made by several parties in different places.*

**608.** Where the same offer to contract is accepted by several persons in different places, the contract of



each is perfected where the last acceptance is completely manifested, as provided in article 607.

*Special agreement as to place of consummating contract.*

**609.** The parties to a contract may expressly agree that their contract shall be deemed to be perfected at any place where a specified act or event occurs, although by the provisions of the last article, it would not have had that effect.

Thus, if it is agreed that an insurance contract shall commence as soon as an order therefor is accepted by the company's agent, the contract is made at the place where the agent accepts, although the principal's stamped policy is executed elsewhere. *St. Patrick Assurance Co. v. Brebner*, 8 *Session Cases*, 1st Series, 51.

*Presumed place of making contract.*

**610.** Where the place of making a contract is not shown, it is presumed to be within the exclusive jurisdiction of the nation in whose tribunal it is sought to be enforced.

*Thatcher v. Morris*, 11 *New York Rep.*, 439, 440.

*Implied contracts.*

**611.** The place of making an implied contract is, that, where the act is done which gives rise to the implication.

An implied contract to repay a loan arises where the loan is made. *Suydam v. Barber*, 6 *Duer (New York) Rep.*, 34.

So whether any, and what implied promise arises from services rendered. *Brckett v. Norton*, 4 *Connecticut Rep.*, 520.

*Presumption as to place of indorsement of negotiable paper.*

**612.** An indorsement of a negotiable instrument, which does not specify a place where the indorsement was made, is conclusively presumed in favor of a holder, without notice of the place where it was indorsed, to have been made where the instrument purports to have been made.

The indorser is the drawer of a new bill, and contracts where he indorses, not where the drawer or maker contracted. *Story, Confl. of L.*, §§ 307, 314; *Parsons on Notes & Bills*, 1., p. 651; *contra*, *Pardessus Droit Commerciale*, p. 17, tit. 7, ch. 2, art. 1500.

*Estoppel.*

**613.** Where a party to a contract induces a person to act on the belief that it was made at a particular place, it is deemed as between them to have been made at that place, if such person would be prejudiced by applying the provisions of this Section, to such contract.

Thus a bill dated in Pennsylvania and drawn on London was transmitted before negotiation to the drawer's agent in England where it was negotiated, without notice that it had its inception in England. It was held, that the drawer had expressly agreed that it should be negotiated as a bill drawn in Pennsylvania, and not as a bill drawn in England. *Lenning v Ralston*, 23 *Pennsylvania Rep.*, 137; 1 *Parsons on Notes & Bills*, 57. To the contrary, see *Steadman v Duhamel*, 1 *Common Bench Rep.*, 888; 1 *Parsons, supra*, 57, *contra*.

## SECTION III.

## FORMALITIES.

**ARTICLE 614.** What law determines the existence of contract.

615. Several parties.

*What law determines the existence of contract.*

**614.** The formalities requisite for the making of a contract are those, and those only, which are prescribed by the law of the place where it is made.

*Story Conf. of L.*, §§ 260-262.

*Westlake, Private Intern. L.*, §§ 171, 173. He adds as a doubtful proposition that the law existing at the place of the contract by which a certain description of evidence is made necessary to support an action, is equivalent to one requiring certain solemnities as preliminary to the contract.

If a contract is void by the law of the place where made, unless written on stamped paper, it is so everywhere. *Satterthwaite v. Doughty*, *Busbee's (North Carolina) Law Rep.*, 314.

So a conveyance in trust of movables is governed as to its form by the law of the place making it. *Wilson v. Carson*, 12 *Maryland Rep.*, 54.

So a mortgage of movables valid as to its form where executed, is valid everywhere, even after a removal of the property. *Ferguson v. Clifford*, 37 *New Hampshire Rep.*, 56; *Jones v. Taylor*, 30 *Vermont Rep.*, 42.

In some reported cases, the law of the place of performance is held to govern as to form. Thus, by the common law the place of performance of a contract to pay money, no place being named, is any place within the country. Such a contract, made in New Jersey, by a resident of that

State, with a resident of another state, no place of performance being expressed, is to be performed in New Jersey; and its law was held to govern as to form. *Allshouse v. Ramsay*, 6 *Wharton*, (*Pennsylvania*,) *Rep.*, 334.

*Several parties.*

**615.** If there are several parties to the contract, the formalities demanded by the law of the place where each one engages are necessary and sufficient in respect to the obligation imposed thereby upon himself.

This rule is laid down with some qualification by *Westlake*, adding that when a contract to which there are several parties is manifested by a single instrument, the necessary form of that instrument, is determined once for all by the law of that place where it begins to have an operation. The illustrations to which he refers are all cases of negotiable paper; in which cases, although it is true, that for the purposes of *transfer* it may be proper to determine the effect of an indorsement, as fulfilling the condition of the promise to pay to order, by the law of the place where the promise to pay was to be performed, (*Everett v. Van Doyes*, 19 *New York Rep.*, 436,) the effect of an indorsement as *creating an obligation* on the part of the indorser, may properly be governed by the law of the place where it is made

In *Lebel v. Tucker*, (*Law Rep.*, 3 *Queen's Bench*, 77,) it was held that the contract of the acceptor of a negotiable bill which was drawn payable and accepted in the same country is to pay to any order if valid by the law of that country although the indorsement may not have been valid by the law of the country where it was made. It was *held*, however, in *Bradlaugh v. De Rin*, (*Law Rep.*, 3 *Common Pleas*, 538,) that as against the acceptor the validity and effect of an indorsement must depend upon the law of the place where the indorsement was made.

## CHAPTER XLVII.

### OBLIGATIONS IMPOSED BY LAW.

ARTICLE 616. Prohibited acts.

- 617. Performance or omission of acts beyond jurisdiction of nation.
- 618. Performance or omission of acts authorized by law.
- 619. Ownership and possession of property.
- 620. Law governing damages caused by act or omission beyond the jurisdiction of nation.

*Prohibited acts.*

**616.** The obligation arising out of an act prohibited

by the law of the place where done, is determined by such law, except as otherwise provided in this Chapter.

*Andrews v. Pond*, 13 *Peters U. S. Supr. Ct. Rep.*, 65. That the law of the place where the wrong is committed determines so far as regards the substance of the matter on which an action of damage is brought, is the rule in America and Scotland, but by the latest English decisions, (*The Halley*, 18 *Law Journ. (N. S.) P. C.*, 879,) the injury must be actionable by the *lex fori*. *Guthrie's Savigny*, p. 205, note.

*Performance or omission of acts beyond jurisdiction of nation.*

**617.** Except as provided in the next article, an obligation may be created in favor of one member of a nation against another, by reason of an act done or omitted beyond its jurisdiction, although no compensation therefor could be recovered by the law of the place.

*Scott v. Seymour*, 1 *Hurlstone & Colman's Rep.*, 234, 235.

*Performance or omission of acts authorized by law.*

**618.** No action can be brought for the performance or omission of an act, if such performance or omission was, 'at the time of its occurrence,' authorized by an express provision of the law of the place.

<sup>1</sup> *Dobree v. Napier*, 2 *Bingham's New Cases*, 781. The present rule extends this provision to an authorization at any time before the action is commenced.

*Ownership and possession of property.*

**619.** The obligations arising from the ownership or the possession of property are determined by the law of the place where the property is for the time being situated.

*Law governing damages caused by act or omission beyond the jurisdiction of nation.*

**620.** Where an act or omission occurs within the jurisdiction of one nation, which causes damage solely within the jurisdiction of another, the obligation to make compensation therefor is determined by the law of the latter.

Thus the obligations arising out of an injury to an immovable wherever committed, (*Thayer v. Brooks*, 17 *Ohio Rep.*, 489;) are governed by the law of the place where the property is situated.

## CHAPTER XLVIIA.

## INTERNATIONAL BILLS OF EXCHANGE.

- ARTICLE** 620a. Definition of bills of exchange.  
620b. Who is indorser.  
620c. Indorsement, general or special.  
620d. General indorsement, how made special.  
620e. What indorser warrants.  
620f. How indorsement qualified.  
620g. Rights of indorsee.  
620h. Want of consideration, when it does not exonerate.  
620i. Who is indorsee in due course.  
620j. Title of indorsee in due course.  
620k. Apparent maturity.  
620l. The same.  
620m. Presentment for acceptance, when.  
620n. Neglect to present for acceptance excuses drawer and  
    endorsers, when.  
620o. Days of grace not allowed.  
620p. Bill, where payable.  
620q. Bill accepted payable at particular place, to be there  
    presented for payment.  
620r. Bill in different parts.  
620s. Agreement to draw requires drawing in three parts.  
620t. Presentment, acceptance, or payment of one, good  
    for all.  
620u. Presentment for acceptance or payment, how made.  
620v. Presentment to one drawee sufficient for all.  
620w. Bill which specifies drawee in case of need, must be  
    presented to him.  
620x. Bill not drawing interest and not presented in certain  
    time, parties exonerated.  
620y. Bill bearing interest, delay does not exonerate.  
620z. Presentment for acceptance excused, when.  
620a1. Delay in presenting excused, when.  
620b1. Presentment and notice excused, when.  
620c1. Presentment excused, when.  
620d1. Delay in presentment excused, when.

- 620e1. Waiver of presentment and of notice, effect of.
- 620f1. Acceptance to be in writing.
- 620g1. If written acceptance refused, bill dishonored.
- 620h1. What may be treated as sufficient acceptance.
- 620i1. Acceptance on separate instrument, how far binding
- 620j1. Unconditional promise to accept, sufficient when.
- 620k1. When acceptor may cancel acceptance.
- 620l1. What acceptance admits.
- 620m1. What may be demanded as condition of payment.
- 620n1. When is bill dishonored.
- 620o1. Notice of dishonor, by whom given.
- 620p1. Notice of dishonor, form of it.
- 620q1. Protest, by whom made.
- 620r1. Protest, where made.
- 620s1. Protest, when made.
- 620t1. Want of protest, when excused.
- 620u1. If bill waives protest, what to be done.
- 620v1. Notice of dishonor, how given.
- 620w1. Notice, how given in case of death.
- 620x1. The same.
- 620y1. Notice of dishonor, when given.
- 620z1. If sent by post, when deposited in post-office.
- 620a2. Notice by agent, when given.
- 620b2. Party receiving notice, when to give notice to prior parties.
- 620c2. Notice of dishonor by one party good for others.
- 620d2. When notice of dishonor is excused.
- 620e2. When dishonored bill may be paid for honor.
- 620f2. Holder bound to accept payment, not acceptance for honor.
- 620g2. Payer for honor, what to declare.
- 620h2. What acceptor or payer for honor must do.
- 620i2. Bill accepted for honor must be presented for payment.
- 620j2. Acceptance for honor, does not dispense with notice of dishonor.
- 620k2. Bill not accepted, must be presented for payment.
- 620l2. Damages allowed.
- 620m2. Damages, how estimated.

*Definition of bills of exchange.*

**620a.** A bill of exchange, within the meaning of this chapter, is an instrument in writing, by which one who is called the drawer, requests another called the drawee, being in another country, to pay there a specified sum of money at sight or within a certain time,

and without any condition not certain of fulfillment, to the order of a third, called the payee. And it may also mention the name of any person in addition to the drawee, to be resorted to in case of need.

*Who is indorser.*

**620b.** One who writes his name upon a bill of exchange, otherwise than as a drawer or drawee, and delivers it, with his name thereon, to another, is called an indorser, and his act is called an indorsement. One who agrees to indorse is bound to write his signature upon the back of the bill, if there is sufficient space thereon for that purpose, and if there is not space, a signature equivalent to an indorsement may be made upon a paper annexed.

*Indorsement, general or special.*

**620c.** An indorsement may be general or special. A general indorsement is one by which no indorsee is named. A special indorsement specifies the indorsee. If the place of indorsement is not specified, it is presumed to be as stated in article 612.

*General indorsement, how made special.*

**620d.** A bill of exchange bearing a general indorsement can not be afterwards specially indorsed ; but any lawful holder may turn a general indorsement into a special one, by writing above it a direction for payment to a particular person ; and a special indorsement may, by express words for that purpose, but not otherwise, be so made as to render the bill not further negotiable.

*What indorser warrants.*

**620e.** Every indorser of a bill of exchange warrants to every subsequent holder thereof, who is not liable thereon to him :

1. That it is in all respects what it purports to be ;

2. That he has a good title to it ;
3. That the signatures of all prior parties are binding upon them ;
4. That if the bill is dishonored, the indorser will, upon notice thereof duly given to him, or without notice, where it is excused by law, pay so much of the same as the holder paid therefor, with interest, unless exonerated as in this chapter provided.

*How indorsement qualified.*

**620f.** An indorser of a bill of exchange may qualify his indorsement with the words "without recourse," or equivalent words ; and upon such indorsement he is responsible only as for a simple transfer of the bill.

*Rights of indorsee.*

**620g.** An indorsee of a bill of exchange has the same rights against every prior party thereto that he would have had if the contract had been made directly between them in the first instance.

*Want of consideration, when it does not exonerate.*

**620h.** The want of consideration for the undertaking of a drawer, acceptor, or indorser of a bill of exchange does not exonerate him from liability thereon to an indorsee who in due course receives it.

*Who is indorsee in due course.*

**620i.** An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a bill of exchange duly indorsed.

*Title of indorsee in due course.*

**620j.** An indorsee of a bill of exchange in due course acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable, and notwithstanding



any defect in the title of the person from whom he acquired it.

*Apparent maturity.*

**620k.** The apparent maturity of a bill of exchange, payable at a particular time, is the day on which by its terms it becomes due; or, when that is a holiday, the next business day.

*The same.*

**620l.** The apparent maturity of a bill of exchange, payable at sight or on demand, is :

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

*Presentment for acceptance, when.*

**620m.** At any time before a bill of exchange is payable, the holder may present it to the drawee for acceptance.

*Neglect to present for acceptance excuses drawer and indorsers, when.*

**620n.** When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated, if it is not presented for acceptance within ten days after the time, which would suffice, with ordinary diligence, to forward it for acceptance, unless such presentment is excused.

*Days of grace not allowed.*

**620o.** Days of grace are not allowed.

*Bill, where payable.*

**620p.** A bill of exchange is payable, within the country on which it is drawn ;

1. At the place where, by its terms, it is made payable; or,

2. If it specifies no place of payment, then at the place to which it is addressed ; or,

3. If it is not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found ; or,

4. If this cannot be done, then at the office of any notary public in the vicinity.

*Bill accepted payable at particular place, to be there presented for payment.*

**620q.** A bill of exchange, accepted payable at a particular place, must be presented at that place for payment, when presentment for payment is necessary, and need not be presented elsewhere.

*Bill in different parts.*

**620r.** A bill of exchange may be drawn in any number of parts, each part stating the existence of the others, and all forming one set.

*Agreement to draw requires drawing in three parts.*

**620s.** An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it.

*Presentment, acceptance, or payment of one, good for all.*

**620t.** Presentment, acceptance, or payment of a single part in a set of a bill of exchange, is sufficient for the whole.

*Presentment for acceptance or payment, how made.*

**620u.** Presentment for acceptance or payment must be made in the following manner, as nearly as by reasonable diligence it is practicable :

1. The bill must be presented by the holder or his agent ;

2. It must be presented on a business day, and within reasonable hours ;

. . . . .

3. It must be presented to the drawee, if he can be found at the place where payable, and if not, then to any person of discretion there, or to any notary public in the vicinity ; and,

4. If the drawee requests it, the bill must be left with him, until the same hour of the next day, to which time he may postpone his acceptance or refusal.

*Presentment to one drawee sufficient for all.*

**620v.** Presentment for acceptance or payment to one of several joint drawees, and refusal by him, dispenses with presentment to the others.

*Bill which specifies drawee in case of need, must be presented to him.*

**620w.** A bill of exchange, which specifies a person to be resorted to in case of need, must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.

*Bill not drawing interest and not presented in certain time, parties exonerated.*

**620x.** If a bill of exchange, payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused.

*Bill bearing interest delay does not exonerate.*

**620y.** Mere delay in presenting a bill of exchange payable with interest, at sight or on demand, does not exonerate any party thereto.

*Presentment for acceptance excused, when.*

**620z.** The presentment of a bill of exchange for acceptance is excused, if the drawee has not capacity to accept it.

*Delay in presenting excused, when.*

**620a1.** Delay in the presentment of a bill of exchange for acceptance is excused, when caused by circumstances over which the holder has no control.

*Presentment and notice excused, when.*

**620b1.** Presentment of a bill of exchange for acceptance or payment, and notice of its dishonor, are excused as to the drawer, if he forbids the drawee to accept, or the acceptor to pay the bill; or if, at the time of drawing, he had no reason to believe that the drawee would accept or pay the same.

*Presentment, when excused.*

**620c1.** Presentment of a bill of exchange and notice thereof are excused as to any party to the bill who informs the holder, within ten days before its maturity, that it will be dishonored.

*Delay in presentment, when excused.*

**620d1.** Delay in presentment, or in giving notice of the dishonor of a bill of exchange, is excused when caused by circumstances, which the party delaying could not have avoided by the exercise of reasonable care and diligence.

*Waiver of presentment and of notice, effect of.*

**620e1.** A waiver of presentment of a bill of exchange waives notice of dishonor also, unless the contrary is expressly stipulated; but a waiver of notice does not waive presentment.

*Acceptance to be in writing.*

**620f1.** An acceptance of a bill of exchange must be made in writing, by the drawee, or by an acceptor for honor; and may be made by the acceptor writing his name across the face of the bill, with or without other words.

*If written acceptance refused, bill dishonored.*

**620g1.** The holder of a bill of exchange, if entitled to an acceptance thereof, may treat the bill as dishonored, if the drawee refuses to write across its face an unqualified acceptance.

*What may be treated as sufficient acceptance.*

**620h1.** The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance :

1. An acceptance written upon any part of the bill, or upon a separate paper ;

2. An acceptance qualified so far only as to make the bill payable at a particular place within the city or municipality in which, if the acceptance were unqualified, it would be payable ; or,

3. A refusal by the drawee to return the bill to the holder after presentment ; in which case the bill is deemed to be payable immediately, without regard to its terms.

*Acceptance on separate instrument, how far binding.*

**620i1.** The acceptance of a bill of exchange, by a separate instrument, binds the acceptor only to one to whom the instrument has been shown, and who, upon the faith thereof, has given value for the bill.

*Unconditional promise to accept, sufficient when.*

**620j1.** An unconditional promise, in writing, to accept a bill of exchange, is a sufficient acceptance thereof, in favor of every person to whom the promise has been shown, and who, upon the faith thereof, has given value for the bill.

*When acceptor may cancel acceptance.*

**620k1.** The acceptor of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder, and before the holder has, with the con-

sent of the acceptor, transferred his title to another person who has given value for it upon the faith of such acceptance.

*What acceptance admits.*

**620i1.** The acceptance of a bill of exchange admits the capacity of the drawer to draw and indorse it; and if written upon the bill, it also admits the same to be genuine, and binding upon the drawer; but it does not admit the signature of any indorser to be genuine.

*What may be demanded as condition of payment.*

**620m1.** A party to a bill of exchange may require, as a condition concurrent to its payment by him:

1. That the bill be surrendered to him, unless it is lost or destroyed, or the holder has other claims upon it; or,

2. If the holder has a right to retain the bill, and does retain it, then that a receipt for the amount paid, or an exoneration of the party paying, be written thereon; or,

3. If the bill is lost, then that the holder give to him an obligation, executed by himself and two sufficient sureties, to indemnify him against any lawful claim thereon, or;

4. If the bill is destroyed, then that proof of its destruction be given to him.

*When bill is dishonored.*

**620n1.** A bill of exchange is dishonored when it is either not paid or not accepted, according to its tenor, on presentment for the purpose; or without presentment, where that is excused.

*Notice of dishonor, by whom given.*

**620o1.** Notice of the dishonor of a bill of exchange may be given:

1. By a holder thereof; or,

2. By any party to the bill who might be compelled to pay it to the holder, or who would, upon taking it up, have a right to reimbursement from the party to whom the notice is given.

*Notice of dishonor, form of it.*

**620p1.** A notice of the dishonor of a bill of exchange must be given with, or be followed by, a protest. The protest must be made by an instrument in writing, giving a literal copy of the bill of exchange, with all that is written thereon, or annexing the original; stating the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept, or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and finally protesting against all the parties to be charged.

*Protest, by whom made.*

**620q1.** Protest must be made by a notary public, if with reasonable diligence one can be obtained; and if not, then by any reputable person in the presence of two witnesses.

*Protest, where made.*

**620r1.** A protest for non-acceptance must be made in the city or municipality in which the bill is presented for acceptance; and a protest for non-payment in the city or municipality in which it is presented for payment.

*Protest, when made.*

**620s1.** A protest must be noted on the day of presentment or on the next business day; but it may be written out at any time within ten days thereafter.

*Want of protest, when excused.*

**620t1.** The want of protest of a bill of exchange, or

delay in making the same, is excused in like cases with the want or delay of presentment.

*If bill waives protest, what to be done.*

**620u1.** If a bill of exchange on its face waives protest, it need not be made; except that if any indorser of such a bill expressly requires protest to be made, by a direction written on the bill at or before his indorsement, protest must be made, and notice thereof given to him and to all subsequent indorsers.

*Notice of dishonor, how given.*

**620v1.** A notice of dishonor may be given :

1. By delivering it to the party to be charged, personally, at any place ; or,

2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him ; or,

3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.

*Notice, how given in case of death.*

**620w1.** In case of the death of a party to whom notice of dishonor should otherwise be given, the notice must be given to one of his personal representatives ; or, if there be none, then to any member of his family who resided with him at his death ; or, if there be none, then it must be posted to his last place of residence, as prescribed by subdivision 3 of the last article.

*The same.*

**620x1.** A notice of the dishonor of a bill of exchange



sent to a party after his death, but in ignorance thereof, and in good faith, is valid.

*Notice of dishonor, when given.*

**620y1.** Notice of the dishonor of a bill of exchange, when given by the holder or his agent, otherwise than by post, must be given on the day of dishonor, or on the next business day thereafter.

*If sent by post, when deposited in post-office.*

**620z1.** When notice of the dishonor of a bill of exchange is given by post, it must be deposited in the post-office in time for the first post which closes after noon of the first business day succeeding the dishonor, and which leaves the place from which, for the place to which, the notice should be sent.

*Notice by agent, when given.*

**620a2.** When the holder of a bill of exchange, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser; and his principal may give notice to any other party to be charged, as if he were himself an indorser. And if an agent of the owner employs a sub-agent, it is sufficient for each successive agent or sub-agent to give notice in like manner to his own principal.

*Party receiving notice, when to give notice to prior parties.*

**620b2.** Every party to a bill of exchange, receiving notice of its dishonor, has the like time thereafter to give similar notice to prior parties as the original holder had after its dishonor. If sent by post, the notice must be deposited in the post-office most conveniently accessible from the place where the party giving it resides or receives notice.

*Notice of dishonor by one party good for others.*

**620c2.** A notice of the dishonor of a bill of exchange, if valid in favor of the party giving it, inures to the benefit of all other parties thereto whose right to give the like notice has not then been lost.

*When notice of dishonor is excused.*

**620d2.** Notice of the dishonor of a bill of exchange is excused :

1. When the party by whom it should be given can not, with reasonable diligence, ascertain either the place of residence or business of the party to be charged ; or,

2. When there is no post-office communication between the domicil of the party by whom the notice should be given and the domicil of the party to be charged ; or,

3. When the party to be charged is the same person who dishonors the bill ; or,

4. When the notice is waived by the party entitled thereto.

*When dishonored bill may be paid for honor.*

**620e2.** On the dishonor of a bill of exchange by the drawee, and, after it has been duly protested, it may be accepted or paid by any person, for the honor of any party thereto.

*Holder bound to accept payment, not acceptance for honor.*

**620f2.** The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor.

*Payer for honor, what to declare.*

**620g2.** One who pays a bill of exchange for honor must declare, before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to reimbursement.

*What acceptor or payer for honor must do.*

**620h2.** An acceptor or payer for honor must write a memorandum upon the bill, stating therein for whose honor he accepts or pays, and must, with reasonable diligence, give notice to such party of the fact of such acceptance or payment. Having done so, he is entitled to reimbursement from such party, and from all parties prior to him.

*Bill accepted for honor must be presented for payment.*

**620i2.** A bill of exchange, which has been accepted for honor, must be presented at its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor in like manner as to an indorser; after which the acceptor for honor must pay the bill.

*Acceptance for honor does not dispense with notice of dishonor.*

**620j2.** The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee.

*Bill not accepted, must be presented for payment.*

**620k2.** If a bill of exchange is by its terms payable at a particular place, and is not accepted on presentment, it must be presented at the same place for payment, when presentment for payment is necessary.

*Damages allowed.*

**620l2.** Damages are allowed as a full compensation for interest, re-exchange, expenses, and all other charges, in favor of a holder for value only, upon a bill of exchange drawn upon any person:

1. In any part of the continent of America or Europe, or the islands in the Atlantic ocean, at the rate of ten per centum thereon;

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2. In any other place, at the rate of twenty per centum thereon.

*Damages, how estimated.*

**620m2.** Damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was negotiated, and where such bills are currently sold.

## PART VI.

## ADMINISTRATION OF JUSTICE.

- TITLE XXVII.** JUDICIAL POWER.  
 XXVIII. PROCEDURE.  
 XXIX. EVIDENCE.  
 XXX. EFFECT OF JUDGMENTS.  
 XXXI. RULES APPLICABLE TO PARTICULAR SUBJECTS
- 

## TITLE XXVII.

## JUDICIAL POWER.

- CHAPTER XLVIII.** In civil cases.  
 XLIX. In criminal cases.
- 

## CHAPTER XLVIII.

## JUDICIAL POWER IN CIVIL CASES.

- ARTICLE 621, 622.** Remedial justice.  
 623. When exercise of jurisdiction may be declined.  
 624, 625. Extra-judicial power.  
 626. Pursuit of inmate of foreign ship upon the high seas  
       for crimes, prohibited.  
 627. Limit of judicial power as to absent persons.  
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 630. Voluntary appearance.  
 631. Effect of judgment by jurisdiction acquired over  
       property.  
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 633, 634. Guardianship.  
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- 636. Actions concerning immovable property.
- 637. Foreign governments and their representatives.
- 638. Public property of one nation within the territory of another.
- 639. Power of consul to appear for member of his nation.
- 640. Judicial power of consuls.

### *Remedial justice.*

**621.** Foreigners are entitled to free access to the tribunals of the nation within whose territorial limits they may be, for the prosecution and defense of their rights, in all cases within the jurisdiction of the nation as defined in articles 308 and 309, and are at liberty to employ advocates and agents of whatever description recognized by the local law, whom they may think proper, and in their judicial recourse may enjoy the same privileges and on the same terms,<sup>1</sup> and no others,<sup>2</sup> as members of the nation. But this right is subject to the conditions respecting security for costs imposed upon transient persons by the laws affecting local tribunals.<sup>3</sup>

<sup>1</sup> This Article, which is broader than the existing rule of international law, is founded upon the provisions contained in the following treaties:

#### Treaty between the United States and

Nicaragua,	June 21, 1867, 15 <i>U. S. Stat. at L.</i> 553.
Honduras,	July 4, 1864, 13 <i>Id.</i> , 703.
Hayti,	Nov. 3, 1864, 13 <i>Id.</i> , 714.
Bolivia,	May 13, 1858, 12 <i>Id.</i> , 1010.
Venezuela,	Aug. 27, 1860, 12 <i>Id.</i> , 1145.
Swiss Confederation,	Nov. 25, 1850, 11 <i>Id.</i> , 588.
Two Sicilies,	Oct. 1, 1855, 11 <i>Id.</i> , 645.
Guatemala,	March 3, 1849, 10 <i>Id.</i> , 878.
San Salvador,	Jan. 2, 1850, 10 <i>Id.</i> , 893.
Costa Rica,	Jan. 10, 1851, 10 <i>Id.</i> , 920.
Peru,	July 26, 1851, 10 <i>Id.</i> , 934.
Argentine Confederation,	July 27, 1853, 10 <i>Id.</i> , 1008.
Hanover,	June 10, 1846, 9 <i>Id.</i> , 865.
New Granada,	Dec. 12, 1846, 9 <i>Id.</i> , 886.
Mecklenburg-Schwerin,	Dec. 9, 1847, 9 <i>Id.</i> , 918.

#### Treaty between Great Britain and

Columbia,	Feb. 16, 1866, <i>Accounts &amp; Papers</i> , 1867, vol. 74.
Italy,	Aug. 6, 1863, <i>Id.</i> , 1864, vol. 66.
Salvador,	Oct. 24, 1862, <i>Id.</i> , 1862, " 75.
Nicaragua,	Feb. 11, 1860, <i>Id.</i> , 1860, " 68.

Treaty of friendship, commerce and navigation between France and New Granada, May 15, 1856, Art. IV., 7 *De Clercq*, 102.

San Salvador, Jan. 2, 1858, " IV., 7 *Id.*, 362.

Peru, March 9, 1861, " III., 8 *Id.*, 193.

By the treaty of friendship, commerce and navigation between France and Honduras, Feb. 22, 1856, Art. IV., (7 *De Clercq*, 10,) it is declared, that foreigners of either nation *are entitled to be present* in the other nation, at all judicial and official investigations, examinations of witnesses and decisions in which they are interested; in all cases in which the laws of the nation allow the publicity of such proceedings.

By the convention between the United States and France, 1831, Art. IV., (8 *U. S. Stat. at L.*, 432,) foreigners may prosecute claims against the government of a nation before the competent judicial or administrative authorities, on complying with its laws and regulations, the dispositions and benefits of which shall be applied to them in like manner as to members of the nation.

*Twiss*, (1 *Law of Nations*, 225,) states the rule which obtains in Great Britain, the United States, the Germanic States and Holland, in substance, as follows:

A foreigner equally with a citizen may bring a personal action against a foreigner before the tribunals of the country where the defendant may be. He may bring real or possessory actions, before the tribunals of the country where the thing in controversy is.

The French rule is more restricted. See the case of *Casalini* against *Isabella*, ex-queen of Spain, Feb., 1870.

Some exceptions which are now recognized in the application of this rule should be noticed.

No suit or proceeding can be maintained in the courts of a neutral nation by the subjects of one belligerent against the subjects of the other for acts growing out of the war. *Juando v. Taylor*, 2 *Paine's U. S. Circ. Ct. Rep.*, 652.

In France, with few exceptions the tribunals do not exercise jurisdiction of controversies between foreigners respecting personal rights and interests, but this is a matter of mere municipal policy and convenience, and does not result from any principle of international law. *Story, Conf. of L.*, § 542.

The American courts make similar exceptions in some cases between the master and seamen of foreign vessels, and other controversies between transient foreigners.

<sup>1</sup> *De La Vega v. Vianna*, 1 *Barnewall & Adolphus*, 284, 288; *Liverpool Marine Credit Co. v. Hunter*, *Law Rep.*, 3 *Chancery App.*, 486.

<sup>2</sup> The right is thus limited by the provisions of several treaties, *e. g.*, Treaty between France and

Sardinia, March 24, 176-, 1 *Felix*, p. 304.

Switzerland, July 18, 1828, 1 *Felix*, p. 304.

*The same.*

**622.** The provisions of the last article apply to

every foreign nation whose existence is recognized by the nation creating the tribunal.

*Republic of Mexico v. Arangoiz*, 5 *Duer (New York) Rep.*, 634; *Hullett v. King of Spain*, 1 *Dow & Clark's Rep.*, 169; *United States v. Wagner*, *Law Rep.*, 2 *Chancery Appeals*, 582; *King of Prussia v. Keupper*, 22 *Missouri Rep.*, 550.

*When exercise of jurisdiction may be declined.*

**623.** Any nation may authorize its tribunals to decline the exercise of jurisdiction in cases between foreigners who have an adequate remedy at home.

See Article 621, note 1.

So far as the nature of the action is concerned, one foreigner may sue another foreigner in American courts for an injury to the person committed in another country, as freely as on a contract made in another country. But for reasons of policy the courts may decline to exercise this jurisdiction, except in special cases. The courts of a country are maintained for the benefit and at the expense of its citizens. It is against public policy to encourage foreigners to bring their matters here for litigation; but if a foreigner flee hither he may be pursued and prosecuted here. *De Witt v. Buchanan*, 54 *Barbour (New York) Rep.*, 31.

*Extra-judicial power.*

**624.** No nation can exercise judicial power within the territorial limits of another nation, except in the cases provided for by this Code, or by special compact.

A treaty is the best proof of the consent and acquiescence of the nation. *Glass v. The Betsey*, 3 *Dallas U. S. Supr. Ct. Rep.*, 6; and see *Jecker v. Montgomery*, 13 *Howard's U. S. Supr. Ct. Rep.*, 498. According to the existing rule, however, it is not the only proof, especially in transactions between European princes and Oriental States, in which cases the existence of a tribunal by sufferance of the local authorities has been held sufficient proof of their consent. Opinions of Sir ROBERT PHILLIMORE, Sir JOHN KARSLAKE and Mr. FORSYTH. *Cases and Opinions in Constitutional Law*, by Forsyth, p. 231, note.

*The same.*

**625.** No nation can execute its process within the exclusive jurisdiction of another. Every act done in attempting such execution is a nullity, incapable of binding persons or property anywhere.

*Story, Conf. of L.*, § 539, extended by making the nullity universal, not merely a rule for other jurisdictions.

*Pursuit of inmate of foreign ship upon the high seas, for crime, prohibited.*

**626.** An inmate of a foreign ship who commits an



infraction of the criminal law of a nation,<sup>1</sup> within its territory, can not be pursued beyond its territory into any part of the high seas.

This would not prohibit such pursuit in cases of infraction of this Code, *e.g.*, piracy.

<sup>2</sup> See *Bluntschli, Droit Intern. Codifié*, § 342, to the contrary.

*Limit of judicial power as to absent persons.*

**627.** Except as provided in this Code, a nation can exercise no judicial power over a person within the exclusive jurisdiction of another nation, other than that which it may exercise through his allegiance.

The exceptions are where the absent person ; (1) voluntarily appears or, (2) has some personal relation, as that of husband, wife or parent, to a person who is within the jurisdiction ; or, (3) was within the jurisdiction at the commencement of the proceedings, but afterwards absented himself.

The object of these provisions is not to define the cases in which each nation will exercise judicial power, but to state those cases in which it is thought the exercise should be prohibited. In cases not within the prohibitions, each nation, may or may not exercise judicial power as it deems proper.

The judicial power in civil cases will extend in general over the following classes of persons and property : (1.) All property movable or immovable within the territorial limits ; (2) All public national property ; and shipping having the national character ; (3.) All persons within the legal territorial or extra-territorial jurisdiction, as defined by Articles 308 and 309 ; and (4.) All the members when not within the exclusive jurisdiction of another nation.

It, perhaps, should be added, that in cases affecting directly the status or social relations existing between two or more persons, the power to adjudge relief to a person domiciled within the state is not necessarily affected by the absence of another party to the relation. Thus, for instance, an order of filiation is held valid under the English statute if founded on service of summons at the last place of abode of the putative father, although it be shown that the man was at the time absent in a foreign country. *The Queen v. Damarell, Law Rep.*, 3 *Queen's Bench*, 50.

*Party to the record.*

**628.** The party to the record is the person on whom the jurisdiction of a tribunal depends, where the jurisdiction depends on the person.

Thus a bill lies to enforce an equitable interest in lands held by the defendant in trust for a foreign government. *Sharp's Rifle Manufac. Co. v. Rowan*, 34 *Connecticut Rep.*, 329.

*Limit of judicial power as to property abroad.*

**629.** Except as provided in this Code,<sup>1</sup> a nation can exercise no judicial power over private property, which is within the exclusive jurisdiction of another nation, other than such<sup>2</sup> as it may exercise by controlling the acts of its owner.

<sup>1</sup> See Article 627, note,

<sup>2</sup> This exception will include such cases as the jurisdiction to enforce specific performance of a contract to convey lands in another nation ; or to cancel a usurious mortgage on such lands ; or to require an assignment by a bankrupt including foreign assets.

*Voluntary appearance.*

**630.** In civil cases, a voluntary appearance of any person, natural or artificial, may be treated as equivalent to personal presence and service within the jurisdiction.

The following authorities extend the jurisdiction to all persons, although beyond the territory, who voluntarily submit themselves to the jurisdiction of the nation in the manner prescribed by its laws in force at the time of such submission. *Meeus v. Thellusson*, 8 *Exchequer Rep.*, 638.

"It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of judicial proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them." *Vallee v. Dumergue*, 4 *Exchequer Rep.*, 290, 303.

"Not only is such a clause binding," (*i.e.*, "a clause that the party in question elects for the purpose of the instrument, a certain spot as his domicile,") "but so also even without express stipulation to that effect is a provision of the law of the place of contract declaring a certain transaction to be of its own force an election of domicile there." *Westlake, Private Intern. Law*, § 383 ; *Vallee v. Dumergue*, 4 *Exchequer Rep.*, 290.

So in several of the United States there are statutes providing that contracts executed and to be performed by foreign corporations within the territory, may be enforced there after service of process on the person who represented the foreign company in making the contract, even though he has ceased to be its agent. *Lafayette Insurance Co. v. French*, 18 *Howard U. S. Supr. Ct. Rep.*, 407 ; *Gillespie v. Commercial Ins. Co.*, 12 *Gray (Massachusetts) Rep.*, 201.

*Effect of judgment by jurisdiction acquired over property.*

**631.** A judgment in a case which is brought within the judicial power of the nation, by reason of the presence or character of the property merely, the person not being subject to the jurisdiction, binds such prop-

erty everywhere ; but can not bind the person anywhere, except in relation to the property, and its application.

*Story Conf. of L.*, § 546. *Green v. Van Buskirk*, 7 *Wallace U. S. Supr. Ct. Rep.*, 139.

*Effect of judgment by jurisdiction acquired over person.*

**632.** A judgment, affecting property in a case which is brought within the judicial power of the nation, by reason of the person merely being subject to the jurisdiction, binds such person everywhere, but can not directly bind property which is not subject to the judicial power of the nation.

*Story, Conf. of L.*, § 543.

*Guardianship.*

**633.** The courts of a nation have power to appoint a guardian of the person of an infant who is within their jurisdiction and there domiciled, or of property within their jurisdiction belonging to an infant who is within or without their jurisdiction.

See *Johnson v. Beattie*, 10 *Clark & Finnelly's Rep.*, 42 ; *McLosky v. Reid*, 4 *Bradford's Surrogate (New York) Rep.*, 334 ; *Stephens v. James*, 1 *Myline & Keen's Rep.*, 627.

*The same.*

**634.** The courts of a nation may interfere to protect the person and property of one not having legal capacity, if such person is within their jurisdiction, notwithstanding the existence of a foreign guardianship ; and may appoint a new guardian for such purpose.

In cases other than infancy, the courts of a nation may determine the question of legal incapacity, upon which the appointment of a guardian depends, so far as it affects the person and movables, unless the person be domiciled in another nation whose courts have determined such capacity ; and in all cases may determine such question as to immovables within its own limits, with the effect prescribed in article 558.

*Forfeiture.*

**635.** An action for a forfeiture can be brought only in a court of the nation imposing the forfeiture. The

term "forfeiture," as used in this article, means a penalty for a wrong, without any necessary relation to the actual damage.

*Westlake, Private Intern. Law*, § 403 ; *Story, Conf. of L.*, § 621.

For example, a statute making officers of a corporation liable for its debts when they fail to make report of the condition of the corporation. *Derickson v. Smith*, 3 *Dutcher (New Jersey) Rep.*, 166.

*Story, Conf. of L.*, § 554.

*Actions concerning immovable property.*

**636.** Actions to recover immovable property, or for injuries<sup>1</sup> thereto,<sup>2</sup> can be brought only in the nation within whose territory the property is situated.

<sup>1</sup> *Doulson v. Matthews*, 4 *Term Rep.*, 503 ; *Livingston v. Jefferson*, 1 *Brockenbrough U. S. Circ. Ct. Rep.*, 203 ; *Watts v. Kinney*, 6 *Hill (New York) Rep.*, 87 ; *Northern Indiana R. R. v. Michigan Central R. R.*, 15 *Howard U. S. Supr. Ct. Rep.*, 242-244.

<sup>2</sup> *Rogers v. Woodbury*, 15 *Pickering (Massachusetts) Rep.*, 156.

*Foreign governments and their representatives.*

**637.** A nation can exercise no judicial power over foreign sovereigns ; nor over the property of foreign states, nations or sovereigns ; except such property as against the will of the nation is within its jurisdiction, and except, also, as provided in the next article.

The exemption of agents of international intercourse is defined by Articles 139 and 140.

*Duke of Brunswick v. King of Hanover*, 2 *Clark & Finnelly's Rep.*, (N. S.) 1.

A foreign sovereign is not amenable to the courts of another country for any act done by him as a sovereign in his own country ; and does not by appearing to a suit waive his right to take that defense ; but if he also has the character of a subject of the country, distinct from that of a foreign sovereign, he may in respect of acts done in that character be made amenable. *Duke of Brunswick v. King of Hanover*, 6 *Beavan's Rep.*, 1 ; 2 *House of Lords Cas.*, 1.

*Public property of one nation within the territory of another.*

**638.** The judicial power of a nation extends to the public property of another nation situated within the territory of the former, for the following purposes only :

1. For the purposes of eminent domain ;<sup>1</sup>
2. For the enforcement of a lien upon such property

created within the jurisdiction, unless claimed by a member of the nation to which the property belongs ; and,

3. To cut off such a lien held by the former nation or its members ;

Subject to the power of the nation in the last two cases to take possession of the property, for the benefit of the foreign nation, on indemnifying the creditor.

<sup>1</sup> See Article 50.

*Power of consul to appear for member of his nation.*

**639.** A consul has power to appear before any court or tribunal, in case of necessity, on behalf of any member of his nation who may be absent, incapable, or not well represented.

Treaty between the United States and New Granada, May 4, 1850, Art. III.

Special authority from the parties in interest is not necessary. *Blunschli, Droit International Codifié*, § 256 ; 1 *Kent's Commentaries*, 43.

*Judicial power of consuls.*

**640.** The consuls of any nation have jurisdiction to determine controversies of every nature<sup>1</sup> arising either at sea or in port, between the officers and crews, or any of them, of ships<sup>2</sup> belonging to the nation of the consul, without the interference of the local authorities, unless the conduct of the parties disturbs the peace ;<sup>3</sup> but without prejudice to the right of the parties to resort, on their return, to the judicial authority of their own nation.<sup>4</sup>

By the Act of Congress of the United States, (March 5, 1855, "to regulate the carriage of passengers on steamships and other vessels,") all disputes and differences of any nature between the captains and their officers on the one hand, and the passengers of their ships on the other, shall be brought to and decided by the circuit or district courts in the United States, to the exclusion of all other courts or authorities ; and this provision is made a part of the treaty between the United States and Italy, Feb. 8, 1868, Art. XII., 15 *U. S. Stat. at L.*, (*Tr.*) 185.

In the case of the *Golubchick*, 1 *W. Robinson Rep.*, 148, 153, it was held that the Court of Admiralty has a right to interfere in suits for wages prosecuted by foreign seamen against foreign vessels.

Consent of the foreign minister or consul is not essential to found the jurisdiction of the court in such a case. It is necessary, however, that notice of intended proceedings should be given in the first instance to the representative of the government to which the vessel proceeded against belongs.

In *La Blache v. Rangel*, *Law Rep.*, 2 *P. C. App.*, 38, Lord ROMILLY

held, that if a foreign consul, by protest, objects to the prosecution of a suit, the Court of Admiralty will determine whether it is proper that the suit should proceed or be stayed. Such protest does not *ipso facto* operate as a bar to the prosecution of the suit, as the foreign consul has not the power to put a *veto* on the exercise of jurisdiction by the Court of Admiralty.

The consul may thus intervene even against the claim of a member of the nation; it is the nationality of the vessel, and not the nationality of the individual seaman suing for wages, that determines the course of procedure.

<sup>1</sup> Convention between the United States and Italy, Feb. 8, 1868, Art. XI., 15 *U. S. Stat. at L.*, 609.

<sup>2</sup> Perhaps this should be expressly restricted to private ships.

<sup>3</sup> Some of the French treaties qualify this by the additional exception of cases, "where a member or inhabitant of the country or one not attached to the vessel is involved."

<sup>4</sup> Treaty between the United States and

Denmark, July 11, 1861, Art. I., 13 *U. S. Stat. at L.*, 605.

Venezuela, August 27, 1860, "XXVI., 12 *Id.*, 1143.

Many other treaties contain substantially similar provisions.

## CHAPTER XLIX.

### JUDICIAL POWER IN CRIMINAL CASES.

ARTICLE 641. Criminal jurisdiction of a nation over its own members.

642, 643, 644. Criminal jurisdiction of a nation over foreigners.

645. Torts against immigrants by carriers.

646. Conspiracies against foreign government.

647. Limit of punishment of foreigners.

648. Punishment on foreign private ships.

649. Foreigners within a nation without their consent.

650. Pirates subject to the criminal jurisdiction of all nations.

*Criminal jurisdiction of a nation over its own members.*

**641.** The members of a nation are subject to criminal prosecution in its own tribunals, and in no others, for an infraction of its criminal law committed within its exclusive jurisdiction, except as provided by this Chapter.

For such infractions committed within its concurrent jurisdiction, they are thus subject until tried for the same acts<sup>1</sup> and convicted or acquitted in a competent tribunal of the nation where the act was committed.

<sup>1</sup>Although the act committed within the concurrent jurisdiction may constitute a different crime by the law of each nation, there seems to be no reason for allowing a double punishment.

*Criminal jurisdiction of a nation over foreigners.*

**642.** The administration of criminal justice by a nation, through its tribunals, extends to foreigners actually within its territorial limits, who have committed an infraction of its criminal law in whole or in part,<sup>1</sup> either,

1. Within its territorial limits ; or,
2. On board the public vessels of the nation in any place whatever ; or,
3. On board the private vessels of the nation on the high seas ; or,
4. On board the private vessels of the nation, within the territorial jurisdiction of another nation, if the offender has not been already tried for the act in question and acquitted, or convicted in a competent tribunal of the nation where the offense was committed.

<sup>1</sup> One whose act in one country causes death in another, may be tried in either. Opinion of Sir J. MARIOTT in *Cases and Opinions in Constitutional Law*, by Forsyth, p. 217.

In *State v. Grady*, 34 *Connecticut Rep.*, 118, the rule laid down was, that no State can punish criminally an act which was wholly committed without its territorial jurisdiction, but if any part of the criminal act be committed within the jurisdiction, the offender, whether he was at the time within the jurisdiction or not, may be punished, if jurisdiction can be obtained of his person.

Crimes committed on the high seas, whether on board public or private ships, are considered as committed in the territory of the nation to which the ship belongs, whether the accused be of the nationality of the ship or a foreigner, and whether the crime were committed against a fellow countryman or between foreigners. *Riquelme, Derecho Internacional*, tom. I., pp. 243, 245, as quoted and approved by Attorney-General CUSHING, 8 *Opinions of U. S. Attorn.-Gen.*, 73, and *Cases and Opin. in Constitutional Law*, by Forsyth, p. 412.

It is there added, in explanation of the rule that if the ship, on board

of which the crime had been committed, arrives at a port, the jurisdictional right of the nation to which the ship belongs over the accused does not on that account cease. So that if the accused were a foreign subject of the nation to which the port belongs, at which the ship stops, even in that case it is the right of the captain to detain him on board, that he may be judged by the tribunals of the ship's country. And if this person should get on shore, and should institute before the tribunals of his country proceedings against the captain, the local authority will be incompetent to judge the foreign captain, because the fact in question occurred in a foreign country,—that is, on board a foreign vessel on the high seas,—and because, by embarking on that ship, the party is presumed to have submitted himself to the laws of the foreign territory of which the ship constitutes a part.

Compare 18 and 19 *Vict.*, ch. 91, § 21; *The Queen v. Lopez*, 27 *Law Journ., Mag. Cases*, 48; *Cases and Opinions in Constitutional Law* by Forsyth, p. 235; and United States Crimes Act of 1825, 4 *U.S. Stat. at L.*, 115.

*Riquelme*, cited above, lays down the rule that crimes committed on board a private vessel within the territorial jurisdiction of a nation are cognizable by the courts of that nation, unless the offense affects only the interior discipline of the ship without disturbing or compromising the tranquillity of the port and without affecting a citizen or domiciled resident of the country, and the local authorities must not interfere except at the instance of the consul and in aid of the jurisdiction of the nation to which the vessel belongs.

The conflict of authorities in reference to this rule will be found reviewed in *Bishop on Criminal Law*, §§ 595–600.

*The same.*

**643.** The criminal jurisdiction of a nation extends to foreigners:

1. Who commit theft beyond its limits, and bring, or are found with, the property stolen, within its limits; or,

2. Who, being beyond its limits, abduct or kidnap, by force or fraud, any person, contrary to the laws of the place where such act is committed, and send or convey such person within the limits of the nation, and are afterwards found therein; or,

3. Who, being beyond its limits, cause, or aid, advise or encourage, another person to commit any act, or be guilty of any neglect within the same, which is a criminal act or neglect according to the laws of the nation, and who are afterwards found within its limits.

*Penal Code, reported for New York*, § 15.



*The same.*

**644.** The criminal jurisdiction of a nation extends also to foreigners found within its jurisdiction, who have committed at any place beyond its territorial limits either as principals or accessories any of the following infractions of its criminal law :

1. A crime against its national safety ; or,
2. Counterfeiting or forging its national seal, national papers, national money having currency within its limits, or bills of any bank authorized by its laws.

These provisions are taken from the Law of June 27, 1866, amending Articles 5, 6 and 7 of the *French Criminal Code*, vol. 9, p. 557.

*Torts against immigrants by carriers.*

**645.** Carriers, of whatever nationality, who bring the aggrieved person within the territorial limits of a nation, are punishable through its tribunals for any wrong committed by them against an immigrant, which, if committed within its exclusive jurisdiction, would be an infraction of its criminal law.

According to the opinions of Sir JOHN DODSON, Sir JOHN ROMILLY and Sir A. E. COCKBURN, (*Forsyth's Cases & Opinions in Constitutional Law*, p. 228,) the courts of Great Britain and of her colonies now have no such jurisdiction in case of injuries committed on the high seas under a foreign flag.

This article would obviate such a failure of justice.

*Conspiracies against foreign nation.*

**646.** Conspiracies formed within the jurisdiction of one nation against the government of a friendly nation and carried into effect by overt acts, are punishable by either nation within whose jurisdiction the offender is found.

See *Regina v. Benard*, 1 *Foster & Finlason's Rep.*, 240; *Cases & Opinions in Constitutional Law*, by Forsyth, p. 236.

*Limit of punishment of foreigners.*

**647.** No greater punishment can be inflicted by any nation on a foreigner than such as is allowed by the law of the place to be inflicted on a member of the nation in a like case.

*Punishment on foreign private ships.*

**648.** No punishment can be inflicted on board of

private ships of one nation, within the territorial jurisdiction of another, greater than is allowed by the law of the latter, for the like offense committed on board of domestic ships.

*Foreigners within a nation without their consent.*

**649.** The provisions of article 642 apply to foreigners brought or being within the territory of a nation without their free consent.

*Regina v. Lopez*, 7 *Coze's Criminal Cases*; S. C., 1 *Dearsly & Bell's Crown Cases*, 525.

See *People v. McLeod*, 25 *Wendell (New York) Rep.*, 602. "It is a well settled rule of international law that a foreigner is bound to regard the criminal laws of the country in which he may sojourn, and for any offense there committed he is amenable to those laws. . . . His escape into Canada did not purge the offense nor oust our jurisdiction. Being retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means or in what precise manner he may have been brought within the reach of justice." *State v. Brewster*, 7 *Vermont Rep.*, 122, 123.

"There is no offense in trying, and, if he be guilty, convicting the subject of a foreign government who has been guilty of a violation of our laws within our jurisdiction; or if he had made his escape from our jurisdiction and by any accident were thrown within it again; if he were shipwrecked on our coast, or fraudulently induced to land by a representation that it was a different territory, with a view to his being given up for prosecution, there would seem to be no reason for exempting him from responsibility to our laws." *State v. Smith*, 1 *Bailey Law Rep.*, 292.

See *Exp. Scott*, 9 *Barnewall & Creswell's Rep.*, 446; *Bishop's Criminal Law*, § 694; *Britton's Case*, 2 *City Hall Rec.*, (*New York*), 119!

*Pirates subject to the criminal jurisdiction of all nations.*

**650.** Persons guilty of piracy, as defined in Chapter X., on PIRACY, are subject to be tried in the courts of any nation within whose jurisdiction they are found, and to be punished as its laws prescribe.

Every human being, whether belonging to a civilized or uncivilized community, and with or without social or political ties, is under the protection of law, and if he does not belong to a nation having a recognized government, an injury to his person or property by a member of any nation, party to this Code, shall be deemed a violation of public law, and punishable as piracy.

## TITLE XXVIII.

## PROCEDURE.

ARTICLE 651, 652. Law of the forum.

653, 654. Measure of damages.

655. Absence of proof of foreign law.

*Law of the forum.*

**651.** The form of the remedy and the mode of procedure are governed by the law of the place where the proceeding is taken.

*Story, Conf. of L.*, §§ 556, 575, *et seq.*; *Carver v. Adams*, 38 *Vermont Rep.*, 500; *Sherman v. Gassett*, 4 *Gilman (Illinois) Rep.*, 521; *Mason v. Dousay*, 35 *Illinois Rep.*, 424.

"On matters of procedure all mankind whether aliens or liege subjects . . . are bound by the law of the forum. If a law were made upon this subject working oppression and injustice to the subjects of a foreign State, that State might make representations and remonstrances against this law to our government; but while it remains in force judges have no choice but to give it effect." *Lopez v. Burslem*, 4 *Moore's Privy Council Rep.*, 305.

The rule extends to the question of parties to a judicial proceeding. *Westlake, Private International Law*, 409; *Kirkland v. Lowe*, 33 *Mississippi Rep.*, 423; *Wilson v. Clark*, 11 *Indiana Rep.*, 385; *Foss v. Nutting*, 80 *Massachusetts (14 Gray) Rep.*, 484; *Blane v. Drummond*, 1 *Brockenbrough U. S. Circ. Ct. Rep.*, 62; *Raymond v. Johnson*, 11 *Johnson's (New York) Rep.*, 490; *Roosa v. Christ*, 11 *Illinois Rep.*, 450.

The rule extends to the admissibility of a set-off, counter-claim, recoupment or compensation. *Story, Conf. of L.*, § 575; *Westlake's Private Intern. L.*, § 411; 2 *Parsons on Contracts*, 592; *Bank of Gallipolis v. Trimble*, 6 *B. Monroe (Kentucky) Rep.*, 599.

The rule extends to defenses under statutes of limitation.

Mr. *Westlake*, however, contends that statutes of limitation are essential modifications of the rights created by the jurisprudence in which they exist, principally on the ground that "a right is only a faculty of putting the law in force,"—i. e., by means of an actual judicial remedy. The definition is certainly opposed to authority, (*Lindsay's Introduction to Jurisdiction*, App. CXV., CXXVI.; *Windscheid Pandekten*, §§ 37, 288;) and does not agree with the rule, that, a lien, mortgage of pledge, is not extinguished by the limitation having attached to the principal obligation, (*Civil Code reported for New York*, § 1605; *Brent v. Bank of Washington*, 10 *Peters' U. S. Supr Ct. Rep.*, 596; *Eastman v. Foster*.

49 *Massachusetts Rep.*, 24; 1 *Washburn on Real Property*, Book I., ch. 16, § 28, p. 561;) and in general, it is certain that a lien may exist although no action lies to enforce it. *Re Bromhead*, 16 *Law Journ.*, *Queen's Bench Rep.*, 355; *Kellett v. Kelly*, 5 *Irish Equity*, 34, 37; *The Siren*, 8 *Wallace U. S. Supr. Ct. Rep.*, 158.

*The same.*

**652.** Where the law of the place not only bars the remedy but vests the title to personal property or extinguishes the right; the title so acquired, and the right so extinguished remain the same everywhere.

*Fears v. Sykes*, 35 *Mississippi Rep.*, 633; *Mosely v. Williams*, 5 *Howard U. S. Supr. Ct. Rep.*, 523; *Shelby v. Gay*, 11 *Wheaton U. S. Supr. Ct. Rep.*, 362.

A statutory prescriptive title acquired by possession extends to cases where the possession is beyond the territory of the State enacting the statute, if the action to enforce the title is brought within such territory. *Blackburn v. Morton*, 18 *Arkansas Rep.*, 384.

*Measure of damages.*

**653.** The measure of compensation in damages which may be awarded in a judicial proceeding is governed by the law of the place where the cause of action arose.

The foreign penalty can not be also awarded. 22 *Illinois Rep.*, 609. Where the statutes of a State make shareholders in a corporation liable for the debts of the corporation, and prescribe the remedy to enforce the same, the courts of another State will not allow creditors to pursue against its own citizens a different remedy which will operate with greater hardship upon them. *Erickson v. Nesmith*, 81 *Massachusetts Rep.*, 221; *Halsey v. McLean*, 94 *Massachusetts Rep.*, 438.

*The same.*

**654.** Where money is the object of the proceeding, the tribunal must allow that sum in the currency of the country where the proceeding is brought, which will place the party in funds to the amount due in the country where the debt is payable, calculated by the real par and not by the nominal par of exchange.

*Story, Confli. of L.*, § 309.

The measure of damages is the amount in the money of the forum which is there equal to the sum which the plaintiff was entitled to abroad.

*Stanwood v. Flagg*, 98 *Massachusetts Rep.*, 124; *Nickerson v. Soesman*, 98 *Id.*, 364; *Cushing v. Wells*, 98 *Id.*, 550; *Marburg v. Marburg*, 26 *Maryland Rep.*, 8; *Renners v. Clemens*, 58 *Pennsylvania State Rep.*, 24.

*Absence of proof of foreign law.*

**655.** The tribunals must in every case apply the law of their own nation, unless a foreign law applicable to the case is shown.

*Foulke v. Fleming*, 13 *Maryland Rep.*, 392 ; *Bean v. Briggs*, 4 *Iowa Rep.*, 464 ; interpretation, *Whidden v. Seelye*, 40 *Maine Rep.*, 247. To the contrary, *Cammell v. Sewell*, 5 *Hurlstone & Norman Rep.*, 740. *Civil Code, reported for New York*, § 1887.

A party who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the court and establish it in full, otherwise the court, not being entitled to take notice of such law without judicial proof, must proceed according to the law of its own nation. *Lloyd v. Ginbert*, *Law Rep.*, 1 *Queen's Bench*, 115.

It is a well settled rule founded on reason and authority, that the *lex fori*, or in other words, the law of the country to whose courts a party appeals for redress, furnishes in all cases, *prima facie*, the rule of decision ; and if either party wishes the benefit of a different rule or law, as, for instance, the *lex domicilii*, *lex loci contractus*, or *lex loci rei sitæ*, he must aver and prove it. *Norris v. Harris*, 15 *California (Harmon) Rep.*, 226. To this rule, an exception has heretofore been recognized to some extent in the United States by presuming that the common law prevails.

## TITLE XXIX.

## EVIDENCE.

## ARTICLE 656. Admissibility and effect of evidence.

657, 658. Notary's certificate.

659. Evidence of foreign laws.

660. Record, how authenticated.

661. Oral evidence of foreign record.

662. Manner of proving other official documents.

663. Contents of official certificates.

664. Taking foreign testimony.

665. Form of oath or affirmation.

*Admissibility and effect of evidence.*

**656.** The law of the nation within whose jurisdiction a tribunal acts, determines the admissibility and effect of evidence produced before it.

*Blocker v. Whittenburg*, 12 *Louisiana Annual Rep.*, 410.

*Westlake's Private Intern. Law*, §§ 172, 177, 412.

Some authorities, however, make an exception to this rule in the case of books of account; and state that their effect as evidence is governed by the law of the place where they are kept. See *Story, Conf. of L.*, § 635; *Fœlix, Droit International Privé*, I., p. 461.

The presumptions arising from a contract are said by *Demangeat*, 1 *Fœlix Dr. Intern. Privé*, p. 461, note (a,) to be within this rule; but the opinion of *Fœlix*, (1 *Id.*, p. 460,) to the contrary is supposed to be correct.

*Notary's certificate.*

**657.** The certificate of a notary, if made under his signature and seal of office, is sufficient in form wherever produced in evidence.

*In re Davis' Trusts*, *Law Rep.*, 8 *Equity Series*, 98.

Where an affidavit is sworn before a notary abroad, the signature must be verified by oath before it can be received here, though the rule has been relaxed where the fund was very small, (*Mayne v. Butler*, 13 *Weekly Rep.*, 128.)

*In re Earl's Trusts*, 4 *Kay & Johnson's Rep.*, 300.

*The same.*

**658.** The certificate by a notary<sup>1</sup> of his presentment

for and demand of acceptance or payment of any instrument which is negotiable by the law of the place where it is payable, and of the refusal of either, and of his protest of such instrument, and of his service of notice thereof on any or all the parties, specifying the mode of giving such notice and the reputed place of residence of the party to whom the same was given, creates a disputable presumption of the facts contained in such certificate<sup>2</sup> as against all persons, but not in favor of the notary himself or his successors in interest.<sup>3</sup>

<sup>1</sup> A uniform rule seems desirable in the case of negotiable paper, leaving the effect of other notarial certificates to be governed by the law of the forum. The American courts hold that the admissibility and effect of a notary's certificate are governed by the law of the forum. *Kirkland v. Wanzer*, 2 *Duer (New York) Rep.*, 278; *Blocker v. Whittenburgh*, 12 *Louisiana Annual Rep.*, 410; *Gautt v. Gautt*, 12 *Id.*, 673. An exception is made by the *Laws of New York*, 1865, ch. 309, in the case of a protest, &c., of a foreign bill, note or check.

<sup>2</sup> *Laws of New York*, 1833, ch. 271, § 8; *Bank of Vergennes*, 7 *Barbour (New York) Rep.*, 143.

<sup>3</sup> This exception is omitted in the New York statute, but seems a reasonable one.

### *Evidence of foreign laws.*

**659.** Copies of statutes, codes or other written laws, and of the proclamations, edicts, decrees and ordinances of the executive power of any foreign nation, when authenticated by the great or principal seal of the nation, or printed in its books or documents purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the tribunals of such nation, are to be admitted by the tribunals of other nations, on all occasions, as presumptive evidence of such laws, proclamations, edicts, decrees and ordinances. The unwritten or customary law of a nation may be proved by oral evidence; and the books of reports of cases adjudged in its tribunals, may also be admitted as presumptive evidence of such law.

See *Laws of New York*, 1869, ch. 883.

The unwritten law of a foreign country is a fact to be proved, as other

facts, by the testimony of experts; the statutory law, by the law itself, or an exemplified copy.

Baltimore & Ohio R. R. Co. v. Glenn, 28 *Maryland Rep.*, 287, Gardner v. Lewis, 7 *Gill (Maryland) Rep.*, 377; De Sobry v. De Laistre; 2 *Harris & Johnson's (Maryland) Rep.*, 191.

A construction given to the statutes or constitution of a State by its supreme judicial tribunal, is to be followed by the courts of other States. Franklin v. Twogood, 25 *Iowa Rep.*, 520.

*Record, how authenticated.*

**660.** A judicial record of a foreign nation may be proved by the attestation of the clerk, with the seal of the tribunal annexed, if there be a clerk and seal, or of the legal keeper of the record with the seal of his office annexed, if there be a seal, and with a certificate of the chief judge or presiding officer, that the person making the attestation is the clerk of the tribunal or the legal keeper of the record, and in either case that the signature of such person is genuine; together with the certificate of the minister or other officer having charge of foreign affairs of the nation, under whose authority the record is kept, and having the custody of the great or principal seal of such government, to the effect that the tribunal whose judicial act is certified, had jurisdiction to perform such act, verifying the signature of the chief judge, or presiding officer.

*Oral evidence of foreign record.*

**661.** A copy of the judicial record of a foreign nation is also admissible in evidence, upon proof.

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it:

2. That such original was in the custody of the clerk of the tribunal, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal, which is proved to be the seal of the tribunal where the record remains, if it be the record of a tribunal, or if there be no such seal, or if it be not a record of a tribunal, by the signature of the legal keeper of the original.



*Manner of proving other official documents.*

**662.** Other foreign official documents may be proved as follows :

1. The acts of the executive, or the proceedings of the legislature, by journals published by their authority, or commonly received as such within the jurisdiction of the nation, or by a copy certified under the seal of the nation or sovereign, or by a recognition thereof, in some public act of the executive.

2. Foreign documents of any other class, by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of the nation or sovereign, that the document is a valid and subsisting document of such nation, and that the copy is duly certified by the officer having the legal custody of the original.

*Contents of official certificates.*

**663.** Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state that the copy has been compared by the certifying officer with the original, and is a correct transcript therefrom, and of the whole of such original, or of a specified part thereof. The official seal, if there be any, of the certifying officer, must also be affixed to the certificate.

*Taking foreign testimony.*

**664.** It is the duty of the tribunals, of a nation to assist the tribunals of other nations in procuring evidence on the application, duly authenticated, of such foreign tribunals, transmitted in the manner prescribed by the law of the nation where the evidence exists.

*Nelson v. United States*, 1 *Peters' U. S. Circ. Ct. Rep.*, 236, note.

*Petition of Jay and Clerke*, 5 *Sandford's (New York) Rep.*, 674.

This mode of proceeding was, however, disapproved in *Ferrie v. Public Administrator*, 3 *Bradford's Surrogate (New York) Rep.*, 249, 264, as exposed to the objection that it removed the investigation into a foreign court and subjected it to foreign rules of evidence.

The French tribunals execute letters rogatory, which are transmitted to them by the Minister of Justice, who receives them from the Minister of Foreign Affairs. *Felix, Droit Intern. Privé*, I., p. 466. Similar provisions exist in Austria, *Id.*, p. 472.

In the United States the courts act without these formalities.

*Form of oath or affirmation.*

**665.** An oath or affirmation administered in the form required by the law of the nation within whose jurisdiction it is administered, on the requisition of a foreign tribunal specifying no form, is a sufficient authentication of the testimony of a witness.

See *Felix, Droit Intern. Privé*, I., §§ 247-249.

## TITLE XXX.

## EFFECT OF JUDGMENT.

**ARTICLE 666.** Force of public or judicial acts.

667. Effect of foreign judgments.

668. Impeachment of foreign judgment.

669. Foreign judgment, forbidden to be enforced.

670. Consent to execution of foreign judgment.

671. Judgment *in rem*.

672. Judgment as to status of a person.

673. Effect of foreign judgments of divorce, insolvency and succession.

*Force of public or judicial acts.*

**666.** Full faith and credit must be given in each nation to the public acts, records and judicial proceedings of the tribunals of every other nation,<sup>1</sup> party to this Code, in cases within its jurisdiction, except as hereinafter in this title provided.

This is the rule adopted between the States of the American Union, by the *Constitution of the United States*, Art. IV., § 1.

<sup>1</sup> This should apply even though jurisdiction was assumed under the express direction of positive law, (*Bishop on Marriage and Divorce*, vol. II., § 182; *Rose v. Himely*, 4 *Cranch's U. S. Circ. Ct. Rep.*, 241,) and to judgments *in rem* or determining *status*, as well as to personal judgments.

The concluding qualification here added, referring to the uniform limit of jurisdiction prescribed by this Code, will preclude the uncertainty which has arisen in the American courts in the application of the rule (*United States Constitution*, Art. IV., § 1) to cases where one State is accustomed to exercise jurisdiction under circumstances in which another would refuse to exercise it, and therefore would refuse to give effect to a judgment of the former.

It may, perhaps, be thought desirable that this provision should be extended to judgments, &c., of the nations which are not parties to this Code.

*Effect of foreign judgment.*

**667.** A personal judgment has no effect beyond the jurisdiction of the nation within which it was rendered, nor within such jurisdiction as against foreigners, ' unless it appears from the record itself or other proof that it was rendered ;

1. By a competent tribunal ; and,
2. Between parties either duly appearing, or cited, and legally represented, or defaulting. <sup>2</sup>

The record is nevertheless open to contradiction in respect to any jurisdictional fact alleged therein.

<sup>1</sup> It seems impossible to give this rule its proper effect, if it is applied to foreign judgments only. If an English surety should sue his American principal in Scotland for money obtained from the surety under the compulsory process of a suit in Scotland without, due appearance or citation, the judgment in that suit ought not to be evidence against the principal, even in Scotland.

<sup>2</sup> By the declaration of September 11, 1860, between France and Sardinia, for the reciprocal execution of decrees and judgments of *superior* courts, (8 *De Clereq*, 118,) it was provided that a court in considering a foreign judgment, can question it only in the three following points: First, whether the decision was that of a competent tribunal; second, whether it was rendered between parties duly cited and legally represented or defaulting; third, whether the rules of public law or the interests of public order in the country where the execution of the judgment is demanded are opposed to the enforcement of the decision of the foreign tribunal.

The enactment of a provision creating a presumption in favor of the competency of a superior tribunal does not seem desirable, particularly as it is easier to prove the competency of a court than to disprove it. See *Laws of New York*, 1865.

By the rule which prevails among the American States, however, a judgment of a superior court of another State is presumed to have been rendered in a case where the court had jurisdiction unless the want of jurisdiction affirmatively appears by the record or by other proof. *Bissell v. Wheelock*, 65 *Massachusetts Rep.*, 277; *Buffman v. Stimpson*, 87 *Id.*, 591; *Dunbar v. Hallowell*, 34 *Illinois Rep.*, 138; *Sanford v. Sanford*, 28 *Connecticut Rep.*, 6; *Gordon v. Robinson*, 15 *Maine Rep.*, 167; *Rankin v. Goddard*, 54 *Id.*, 33. This appears also to be the rule applied by the English courts to foreign judgments. *Barber v. Lamb*, 8 *Common Bench Rep.*, 95, and cases there cited.

Some earlier authorities tend to the conclusion that a foreign judgment can not be disputed where the court by which the judgment was rendered has jurisdiction of the subject of the suit and of the parties.

These rules are only applied by the English courts, where it appears that the judgment was on the merits, and that by the law of the place where it was recovered, the decision was final. *Frayes v. Worms*, 10 *Common Bench Rep.*, (N. S.), 153.

### *Impeachment of foreign judgment.*

**668.** A foreign judgment may be impeached for fraud or collusion.

The authorities restrict the rule to fraud or collusion which could not

have been proved in the action. But it is suggested that this qualification should be omitted.

*Foreign judgment, forbidden to be enforced.*

**669.** No nation is bound to give effect to a foreign judgment, if the enforcement thereof is forbidden by an express <sup>1</sup> provision of its own law.

See Article 666.

*Consent to execution of foreign judgment.*

**670.** A foreign judgment cannot be executed within the territorial jurisdiction of a nation, without a judicial inquiry as to its existence, local validity, and extent.

*Judgment in rem.*

**671.** A judgment against a specific thing, whether it expressly determines the title to the thing or merely directs specifically its sale,<sup>1</sup> is conclusive upon all the world as to the title under the judgment or under the sale had pursuant to it.

<sup>1</sup> Judgments directing sale for satisfaction of a debt, were held to be in the nature of judgments *in rem*, and governed by the rule above stated in *Imrie v. Castrique*, 8 *Common Bench Rep.*, (N. S.,) 405.

*Judgment as to status of a person.*

**672.** A judgment in respect to the personal, political or legal condition or relation of a particular person is conclusive upon all persons.

Judgments on pedigree have been held within the rule that the record of a judgment *in rem* is evidence of the facts adjudicated against all the world. *Ennis v. Smith*, 1852, 14 *Howard's U. S. Supreme Ct. Rep.*, 400.

*Effect of foreign judgments of divorce, insolvency and succession.*

**673.** The effect of a judgment, rendered in a case of divorce, or of the administration of the estate of an insolvent or decedent, is subject to the provisions of the next three Chapters.

## TITLE XXXI.

## RULES APPLICABLE TO PARTICULAR SUBJECTS.

## CHAPTER L. Divorce.

LI. Bankruptcy and insolvency.

LII. Estates of decedents.

LIII. Admiralty.

## CHAPTER L.

## DIVORCE.

## ARTICLE 674. Power of divorce.

675. Jurisdiction unaffected by change of domicil.

676. The domicil required for jurisdiction.

677. Judgment of divorce for defendant.

678. Judgment of divorce everywhere valid.

679. Sufficiency of cause of divorce.

680. Evasion of law.

681. Obligations.

682. Disabilities.

683. "Divorce" defined.

The following Articles on the vexed subject of divorce have been framed with a general regard to the principle suggested by *Westlake*, (*Private Intern. L.*, p. 342,) "that divorces should not be granted when they will not be internationally respected, nor refused when they are demanded by the policy and morals of the forum."

As the law now stands, hardly any state observes the same rule in recognizing the validity of divorces, granted by other states, which it asserts in the exercise of its own jurisdiction to grant divorces. The decided tendency of the English and American decisions, however, is toward the simple and uniform principle, that the jurisdiction to grant a divorce should depend upon the domicil of the parties, or of one of them, at the time of suit.

The contradictory or conflicting rules which various states have adopted as defining their own jurisdiction in this respect may be contrasted as follows :

1. That a State may grant divorces to its own citizens or subjects.
2. That a State where a marriage is contracted may dissolve the marriage.
3. That the State where the husband was domiciled at the time of his marriage, may dissolve the marriage.
4. That a State within which an offense against the marriage tie is committed may dissolve the marriage.
5. That a State in which the parties, (that is to say the husband,) had a domicil at the time of the offense, wherever the offense may have been committed, has jurisdiction.
6. That the State where the injured party is domiciled at the time of the offense, has jurisdiction.
7. That the State in which the parties, (that is to say the husband,) has domicil at the time of suit, has jurisdiction.

This rule is, by some authorities, qualified, by conceding that the husband can not, after the offense, change his domicil so as to prevent the wife from proceeding in the previous domicil.

8. That the State in which a plaintiff is domiciled has jurisdiction without respect to the domicil of the defendant.

9. That the State in which either party is domiciled at the time of suit has jurisdiction,

In many States, particularly those which refer to the domicil at the time of suit, an actual domicil for all intents and purposes is not required, but a residence for a longer or shorter period prescribed by positive rule.

The first rule is asserted on the principles that the status of persons must be determined by the domicil of origin, the land of their birth, and that subjects, wherever they are, must be regarded, at least by the courts of their own country, as retaining their original character.

The third rule is asserted by some authorities as the exclusive ground of jurisdiction, upon the principle that the law of the place should be regarded as a part of the contract.

The fifth rule is asserted as the exclusive rule of jurisdiction, on the ground that the offense is against the law which governs the status of the parties.

The seventh, upon the ground that it is for each State to regulate the status of persons domiciled within it; and that, as the law which may be in force at the time of suit ought to govern, so the law of the *place*, where the parties are subject at the time of suit, ought to govern.

The other rules asserted are embodied, either singly or in combination, in the legislation of various States, but have not been the subject of so much discussion in an international point of view.

The provisions of the statutes of a few of the American States are as follows :

The rule in *Massachusetts* in reference to the granting of judicial declarations of the nullity of marriages, void under the statute, is as follows: Upon proof of the fraud or other cause of nullity, the marriage is to be declared void by a sentence of divorce or nullity, notwithstanding that such marriage was solemnized out of the State, if the libellant had

his domicile here when the marriage was so solemnized and when the libel was filed. *Gen. Stat. of Massachusetts*, of 1860, p. 532, § 4.

In reference to divorces, strictly so called, the rule is as follows: When the libellant has resided in the State five consecutive years next preceding the time of filing the libel, a divorce may be decreed for any cause allowed by law, whether it occurred in the commonwealth or elsewhere; unless it appear, that the libellant has removed into this State for the purpose of procuring a divorce. *Id.*, § 11.

The law of *Connecticut* is as follows: "If the petitioner shall have removed from any other State or nation to the State, or shall not have statedly resided in the State three years next before the date of the petition, the petitioner shall not take anything by the petition, unless the cause of divorce shall have arisen subsequently to the removal into this State, or unless the adverse party shall have statedly resided in this State three years next before the date of the petition, and actual service of the petition shall have been made upon such party, in which cases the petitioner may maintain the petition, although he or she shall not have removed into this State, nor resided therein, three years next before the date of the petition." *Gen. Stat. of Connecticut*, of 1866, p. 306, § 35.

In *Pennsylvania*, the statute which formerly allowed divorces to be granted only on the application of a citizen of the State who has resided for a year within it has been modified to allow divorces to be granted to a plaintiff who either is a citizen or has resided in the State for one year previous to filing the petition. *Purdon's Digest, by Brightly*, 346-7.

The law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local laws without reference to the law of the place of the original marriage. This is the rule laid down, as that established in *Pennsylvania*, in *Colvin v. Reed*, 55 *Pennsylvania State Rep.*, 375.

But the courts held that the power is only to be exercised where the parties at the time of the injury were actually domiciled within the State. *Dorsey v. Dorsey*, 7 *Watts (Pennsylvania) Rep.*, 349. This rule has been extended in the case of desertions, to those taking place in other States of the Union, but not to those taking place abroad. *Bishop v. Bishop*, 30 *Pennsylvania State Rep.*, 412.

In *New York*, in cases of adultery, &c., the courts have jurisdiction:

1. Where both husband and wife were inhabitants of this State, at the time of the commission of the offense;
2. Where the marriage has been solemnized, or has taken place in this State, and the injured party, at the time of the commission of the offense, and at the time of exhibiting the bill of complaint, shall be an actual inhabitant of this State;
3. Where the offense has been committed in this State, and the injured party, at the time of exhibiting the bill of complaint, is an actual inhabitant of this State. 2 *New York Revised Statutes*, p. 144, § 38.

The statute of *Ohio* requires the petitioner to be a resident of the State at least one year before filing the petition, and allows a divorce whether the marriage took place or the cause of divorce occurred within the State



or elsewhere. If the defendant is not a resident of the country, service may be made by publication and mailing. *Rev. Stat. of Ohio, by Swan, &c.*, vol. I., p. 513, 511.

The statute of *Illinois* is, "No person shall be entitled to a divorce in pursuance of the provisions of this chapter, who has not resided in the State one whole year previous to filing his or her bill or petition, unless the offense or injury complained of was committed within this State, or whilst one or both of the parties resided in this State." *Statutes of Illinois, by Scates, T. & B.*, vol. I., p. 150, § 3.

The statute of *Indiana* provides that, "divorces may be decreed by the circuit courts of this State, on petition filed by any person, who, at the time of filing such petition, shall have been a *bona fide* resident of the State one year previous to the filing of the same, and a resident of the county at the time of the filing of such petition, which *bona fide* residence shall be duly proven by such petitioner to the satisfaction of the court trying the same." Act of March 4, 1859, *Statutes of Indiana*, of 1862, vol. II., p. 350, § 6.

The statute of *California* requires residence within the State by the plaintiff for divorce, for a period of six months immediately preceding the application. *General Laws of California*, vol. I., p. 2415.

The rule in *Virginia* is as follows: "No such suit shall be maintainable, unless the parties, or one of them, is a resident of the State at the time of bringing the suit. The suit shall be brought in the county or corporation in which the parties last cohabited, or (at the option of the plaintiff,) in the county or corporation in which the defendant resides, if a resident of the State; but if not, then in the county or corporation in which the plaintiff resides." *Code of Virginia*, of 1860, p. 530, § 8.

Nearly all these rules, it will be seen, authorize divorces in cases in which the existing rules of international law would not recognize the validity of a divorce.

Under the *English statute* it is understood that the courts have jurisdiction to grant divorces where the domicil of the parties is English, although the marriage and adultery took place abroad. They also have jurisdiction where the parties are English subjects, although the offending husband has changed his domicil and committed the offense in a foreign domicil, and also where foreigners domiciled abroad are married in England according to English law. *Chitty's Statutes*, vol. I., p. 1275, note a.

The English statute authorizes the petition to be served within or without the dominion, or service to be dispensed with entirely by the court.

The provisions of this Chapter, in connection with those of Chapter XXXIX. on MARRIAGE, have been proposed in the hope of presenting a rule which would avoid the grave inconveniences attending an irreconcilable conflict of jurisdiction in reference to a relation so closely connected with the morals and welfare of society. No State, it is conceived, ought to grant divorces upon any rule of jurisdiction which it will not reciprocally recognize and respect when exercised by any other State.

*Power of divorce.*

674. The power of a nation to grant divorces exists in the following cases only :

1. When both parties have their domicile within the nation at the time the application for a divorce is made ;<sup>1</sup> or,

2. When either party has such a domicile and the other is within the jurisdiction of the nation, and has personal notice of the proceeding ;<sup>2</sup> or,

3. When the marriage was contracted within the nation or by its officers, and the applicant for the divorce is domiciled there at the time of the application, and the other party has such notice as the proper authorities of the nation require.<sup>3</sup>

<sup>1</sup> *Story, Conf. of L.*, § 597 ; *Westlake's Private International Law*, p. 351 ; *Bishop, (Marriage & Divorce*, vol. II., § 144,) supported the jurisdiction in this case, and it is established also in Scotland.

It is said by *Kent, (2 Commentaries*, pp. 117, 118,) that " if a marriage is dissolved in a foreign country not by a regular judicial sentence but by a special legislative act passed for that purpose ; would such a divorce not be binding here ? While it is conceded to be a principle of public law, that acts valid by the law of the place where they arise are valid everywhere, it is at the same time to be understood that this principle relates only to civil acts founded on the volition of the parties, and not to such as proceed from the sovereign power. The force of the latter can not be permitted to operate beyond the limits of the territory, without affecting the necessary independence of nations."

In an international Code it should seem proper to recognize the power of the nation to grant divorces, leaving the department by which this power is to be exercised, to be determined by the municipal law.

<sup>2</sup> *Bishop* states, that the jurisdiction exists in this case and that notice is not always necessary, but it seems proper to require it, and the provision contained in subdivision 3 will obviate any real hardship.

<sup>3</sup> The difficulty arising when the wrongdoer removes to avoid the jurisdiction has been the subject of some discussion, and suggests the principle of allowing the resort in such case to the State by authority of which the marriage was made.

The Revised Statutes of *Louisiana* of 1850, contain the following provisions : Whenever a marriage shall have been contracted in this State, and the husband, after such marriage, shall remove or shall have removed to a foreign country with his said wife, if said husband shall behave or shall have behaved toward his said wife in said foreign country in such manner as would entitle her, under our laws, to demand a separation of bed, board, or a separation of property, it shall be lawful for her on returning to the domicile where the marriage was contracted, to

institute a suit there against her said husband for the purposes above mentioned, in the same manner as if they were still domiciliated in said place, any law to the contrary notwithstanding. In such cases an attorney shall be appointed by the court to represent the absent defendant; the plaintiff shall be entitled to all the remedies and conservatory measures granted by law to married women, and the judgment shall have force and effect in the same manner as if the parties had never left the State. *Rev. Stat. of Louisiana*, p. 242, § 4.

*Jurisdiction unaffected by change of domicil.*

**675.** A change of domicil after proceedings commenced, does not take away the jurisdiction.

This article is intended to provide for cases such as those where a domiciled plaintiff changes his domicil to avoid a cross bill by a domiciled defendant or one who is not domiciled within the jurisdiction, but is only found and served there, under the provision of the first and second subdivisions of Article 674.

*The domicil required for jurisdiction.*

**676.** The domicil required for the purpose of jurisdiction to grant divorce is that defined by Title VII., on DOMICIL.

*Judgment of divorce for defendant.*

**677.** If a suit for divorce be within the jurisdiction of the tribunal, it may entertain a complaint from either party, and grant a divorce to the defendant if the case require it.

This provision is suggested by *Jenness v. Jenness*, 24 *Indiana Rep.*, 355.

*Judgment of divorce everywhere valid.*

**678.** A judgment of divorce pronounced by the proper authority of a nation having jurisdiction, is valid everywhere.

*Sufficiency of cause of divorce.*

**679.** The sufficiency of a cause of divorce depends exclusively on the law of the forum at the time judgment is pronounced.

*Westlake's Private Intern. Law*, p. 335.

The English rule, it is understood, adheres to the law of England in respect to the cause of divorce, in testing the validity of a divorce from an English marriage, granted by a foreign court to suitors domiciled within its jurisdiction. But the converse of this rule would not be applied; English courts would not grant divorce from a foreign marriage on grounds recognized only by the foreign law.

The rule proposed in the text seems the proper one to secure uniformity.

*Evasion of law.*

**680.** A divorce granted by the authorities of any nation to a person, intending to evade thereby the provisions of this Chapter, is invalid everywhere.

*Shannon v. Shannon*, 86 *Massachusetts Rep.*, 134.

The doctrine of the comity of nations requires this. By the existing rule, such a divorce is perhaps valid in the State where granted. *Walker's American Law*, 717.

*Obligations.*

**681.** Obligations imposed by a judgment of divorce follow the person, and may be enforced wherever he is found.

Where a court of competent jurisdiction in New York, decreed a divorce *a mensa et thoro* between man and wife, allowing alimony to the latter, and the husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, and while in Wisconsin, without disclosing the circumstance of the divorce in New York, obtained a divorce *a vinculo* on the allegation that his wife had wilfully abandoned him,—it was *held* that the divorce could not release the husband from his liability to the decree made against him in New York, upon that decree being carried into judgment in any court where the defendant might be found, or within whose jurisdiction he might have acquired a new domicile. *Barber v. Barber*, 21 *Howard's U. S. Supr. Ct. Rep.*, 582.

By other provisions of this Code, a judgment of divorce though it can not directly affect the title to real property in another nation, may affect the title to personal property, to the same extent as any other transfer by operation of law.

*Disabilities.*

**682.** Disabilities imposed by a judgment of divorce, are territorial, and do not affect the capacity of the person when in another jurisdiction, if by the law of the latter place, such disabilities do not exist.

*Ponsford v. Johnson*, 2 *Blatchford's U. S. Circuit Ct. Rep.*, 51.

A decree of divorce pronounced by the court of chancery of New York was, in its purport and by force of the statute of the State, regarded as an absolute dissolution of the marriage contract for both parties, but the disqualification or disability to marry again declared by the statute as attaching to the guilty party by way of penalty, was considered as operative only within the State of New York, and not as incapacitating him from contracting a valid marriage in the State of New Jersey, where the same disability does not exist. *Ponsford v. Johnson*, *supra*.

The Statutes of Massachusetts contain a provision that, "When a divorce from the bond of matrimony, except for the cause of adultery, has been granted under the laws of this State or any State or territory of the United States, the justices of the supreme judicial court, or either of them, upon petition filed by the party against whom the divorce was granted, (if the party reside in this State at the time of granting the divorce,) and upon such [notice] as the court shall order, may authorize such party to marry again." *General Stat. of Massachusetts*, of 1860, p. 534, § 26.

*"Divorce" defined.*

**683.** The term "divorce" as used in this Code includes a judgment declaring the parties or either of them free from any or all of the personal obligations of marriage.

This will include decrees of nullity and separation, as well as decrees of dissolution of marriage.

In *Birt v. Boutinez*, *Law Rep.*, 1 *Probate & Divorce*, 487, it was held that the parties having been married in Scotland, and a second time in Belgium, a Belgian judgment dissolving the Belgian marriage, did not dissolve the Scotch marriage.

Under the uniform rules embodied in this Code, a judgment of divorce should reach the *status* of the parties, and not be limited to a particular contract.

## CHAPTER LI.

### BANKRUPTCY AND INSOLVENCY.

**ARTICLE 684.** Validity of discharge.

685. Transfer of property.

686. Judgment of bankruptcy without transfer of property.

*Validity of discharge.*

**684.** The nation, whose law, according to Article 603,<sup>1</sup> governs the interpretation of a contract, or whose law creates any other obligation, has jurisdiction to grant a discharge therefrom; and such discharge, if valid according to its law, is valid everywhere.<sup>2</sup>

A discharge granted in any other place, is valid only as against the nation by whose authority the same is granted, its members and its domiciled residents,<sup>3</sup> and

such persons as have obtained or are seeking the benefit of the proceedings in which it was granted. <sup>1</sup>

<sup>1</sup> Chapter XLVI., on CONTRACTS.

<sup>2</sup> *Story, Conf. of L.*, § 331. This is the general principle of international law laid down by *Story*, (*Id.*, § 340,) and the American cases restricting the effect of a bankruptcy discharge to indebtedness due to citizens of the state are regarded by him as resulting from the peculiar principles of American constitutional law, and not applicable to foreign discharges. Although some other authorities take a different view, it should seem better to adopt the general principle, and make the discharge valid everywhere, subject to the right of every State to apply all property within its territorial jurisdiction to the payment of domestic creditors. See Articles 583 and 685.

<sup>3</sup> *Story, Conf. of L.*, § 342.

<sup>4</sup> Persons who voluntarily prove their claims in the state where the discharge is granted, thereby place themselves under its jurisdiction. *Dunlap v. Rogers*, 47 *New Hampshire Rep.*, 281; *Clay v. Smith*, 3 *Peters' U. S. Supr. Ct. Rep.*, 412.

The act relied on must, of course, be unequivocal. *Dynnelly v. Corbett*, 7 *New York Rep.*, 507.

But the rejection by courts in one state, of the claim of a non-resident against the insolvent estate of a resident, will not bar the same claim when presented in the state of the domicile of such non-resident. *Taylor v. Barron*, 35 *New Hampshire Rep.*, 484.

### *Transfer of property.*

685. A transfer of movables made by a debtor, whether by reason of judicial proceedings or otherwise, which is valid by the law of the place where it is made, is valid as to such property everywhere, subject to the right of any other nation to give a preference or lien in respect to the movables within its jurisdiction to creditors who are subject to its jurisdiction as defined by Title XXVII., on JUDICIAL POWER.

<sup>4</sup> *Kent's Commentaries*, 406; *Hunt v. Columbian Ins. Co.*, 55 *Maine Rep.*, 290; *Dunlap v. Rogers*, 47 *New Hampshire Rep.*, 281.

It has generally been held, when questions have arisen in the United States between the bankrupt under a foreign law and his assignee under the same law, they both being citizens and subjects of the country enacting the law, where no rights of creditors, citizens of the United States, intervened, that effect should (there) be given to the foreign law. *Plestero v. Abraham*, 1 *Paige (New York Rep.)*, 236; *Abraham v. Plestero*, 3 *Wendell (New York Rep.)*, 540; *Hall v. Boardman*, 14 *New Hampshire Rep.*, 38; *Hoag v. Hunt*, 21 *Id.*, 106; *Smith v. Brown*, 43 *Id.*, 44; *Dunlap v. Rogers*, 47 *New Hampshire Rep.*, 281; *Hall v. Winchell*, 38 *Vermont Rep.*, 588.

It is the settled doctrine of the courts in the United States, that a prior

assignment in bankruptcy under a foreign law will not transfer property elsewhere as against a creditor of the bankrupt who is a citizen of the government where the property is situated. *Frink v. Buss*, 45 *New Hampshire Rep.*, 325.

*Judgment of bankruptcy, without transfer of property.*

**686.** A judgment divesting a debtor of his property, without a transfer by him, is valid in the cases, and to the extent prescribed in chapter XLVIII., on JUDICIAL POWER IN CIVIL CASES.

## CHAPTER LII.

### ESTATES OF DECEDENTS.

**ARTICLE 687.** Jurisdiction to grant administration.

688. Limit of administration.

689. Local nature of power of administration.

690. Actions by foreign personal representative.

691. Principal and ancillary administrations.

692. Title to movables.

693. Ancillary representative.

694. Course of administration.

695. Application of property to payment of decedent's debts.

696. Actions against foreign personal representative.

697. When judgment of Probate Court, as to right of succession, is conclusive.

698. Probate of will of property in foreign country.

*Jurisdiction to grant administration.*

**687.** Subject to the provisions of articles 338 to 344 inclusive,<sup>1</sup> the nation within whose jurisdiction the movables<sup>2</sup> of a decedent or his debtors<sup>3</sup> or their property are found, has jurisdiction<sup>4</sup> to grant authority to administer such movables and the debts due to the decedent by such debtors, in the mode prescribed by this Chapter, whether with or without a will.

<sup>1</sup> The reference is to the consular power to administer the assets of seamen, &c.

<sup>2</sup> *Matter of Texidor*, 2 *Bradford's Surrogate (New York) Rep.*, 105;

Public Administrator *v.* Hughes, 1 *Id.*, 125. "Upon the whole," says Surrogate BRADFORD, in Kohler *v.* Knapp, (1 *Bradford Surr. New York Rep.*, 244,) upon a review of authorities, "I am inclined to think that the modern rule, accommodating itself to new cases and exigencies, is in favor of the exercise of jurisdiction upon the sole basis of assets of a foreign decedent coming into the State after his decease."

By the treaty between the United States and the

Swiss Confederation,	1850, Art. VI., 11 <i>U. S. Stat. at L.</i> , 587.
Brunswick and Lœneburg,	1854, " I., 11 <i>Id.</i> , 601.
Two Sicilies,	1855, " VII., 11 <i>Id.</i> , 639.
France,	1853, " X., 10 <i>Id.</i> , ( <i>Tr.</i> ), 114.
Russia,	1832, " X., 8 <i>Id.</i> , 444.

and some other American treaties, any controversy that may arise among the claimants to the same succession as to whom the property belongs, shall be decided according to the laws and by the judges of the country in which the property is situated.

See, also, treaty between United States and

Hesse-Cassel,	March 26, 1844, 9 <i>U. S. Stat. at L.</i> , ( <i>Tr.</i> ) I., Art. V.
Bavaria,	Jan. 21, 1845, 9 <i>Id.</i> , 9.
Saxony,	May 14, 1845, 9 <i>Id.</i> , 48.
Nassau,	May 27, 1846, 9 <i>Id.</i> , 48.

See, however, the convention between France and Austria, for the regulation of successions, Dec. 11, 1866, Art. II., (9 *De Clercq*, p. 675,) which provides that claims to the succession of movables left in one country by subjects of another, whether at the time of their death established there, or simply transitory persons, are within the jurisdiction of and determinable by the laws of the State to which the deceased belonged.

<sup>3</sup> Debts constitute assets where the debtor resides. Kohler *v.* Knapp, 1 *Bradford's Surrogate (New York) Rep.*, 241.

<sup>4</sup> When, however, its exercise of such jurisdiction would be productive of injustice, inconvenience, or conflicting equities, the nation should decline to exercise it, and remit the property abroad for *distribution*. Harvey *v.* Richards, 1 *Mason U. S. Circ. Ct. Rep.*, 381, 413; *Cooper's Equity Pleadings*, pp. 1, 2, 3; Parsons *v.* Lyman, 20 *New York Rep.*, 103, 125.

### *Limit of administration.*

688. The provisions of the last article do not apply :

1. To those movables, belonging to a decedent at the time of his death, which have been brought within the jurisdiction, after a personal representative duly appointed elsewhere has taken possession of them within the jurisdiction of the nation appointing him ; nor,<sup>1</sup>

2. To debts due by parties to a negotiable instrument which at the time of the holder's death was within another jurisdiction, the decedent being also domiciled therein at his death.<sup>2</sup>



<sup>1</sup> *Westlake's Private International Law*, § 295; *Story, Conf. of L.*, § 520; *Currie v. Bircham*, 1 *Dowling & Ryland's Rep.*, 35.

<sup>2</sup> *Owen v. Moody*, 28 *Mississippi (7 Cushman) Rep.*, 79. This exception has been recognized in respect to property which never became assets within the local jurisdiction but was removed into that jurisdiction from the place of principal jurisdiction.

*Local nature of power of administration.*

**689.** A personal representative can not act beyond the limits of the nation appointing him, in relation to property of the decedent, except as provided in the next article.

This provision departs somewhat from the rule recognized by the New York Court of Appeals. *Peterson v. Chemical Bank*, 32 *New York Rep.*, 21.

The rule laid down in *Marcy v. Marcy*, 32 *Connecticut Rep.*, 308, as being supported by the current of American decisions at the present day, is that, in the absence of an ancillary administration, a principal administrator, and *a fortiori*, an executor, can collect and remove debts or property due or situated in another State, if voluntarily paid or given up.

*Actions by foreign personal representative.*

**690.** A foreign personal representative may sue, without any other appointment, to enforce his title to the movables and debts mentioned in article 688, or to recover debts due by persons who at the time of the creditor's death had their domicile within the jurisdiction of the nation appointing him.

*Principal and ancillary administrations.*

**691.** The place of domicile of the decedent is the place of principal administration; every other administration is ancillary.

*Cummings v. Banks*, 2 *Barbour (New York) Rep.*, 602; *Ordronaux v. Helie*, 3 *Sandford's Chancery Rep.*, 512; *Juarez v. Mayor, &c., of New York*, 2 *Id.*, 173; *Churchill v. Prescott*, 3 *Bradford's Surrogate (New York) Rep.*, 233.

*Title to movables.*

**692.** The title to movables duly vested in a foreign personal representative, or duly acquired through a foreign administration and executed by possession, is valid everywhere.

*Story, Conf. of L.*, §§ 258, 259; *Peterson v. Chemical Bank*, 32 *New York Rep.*, 21.

The principle here applied is not to recognize the power conferred by the courts as having an extra-territorial effect; but to recognize the title acquired under the power *executed by possession*, as valid everywhere.

*Ancillary representative.*

**693.** An ancillary representative represents the estate only so far as concerns the assets coming under his control.

*Course of administration.*

**694.** Every ancillary personal representative is bound to transmit to his principal the assets remaining in his hands after satisfying the claims of creditors, who are subject to the jurisdiction of the nation appointing him, to be administered by the principal, either extra-judicially, or, if needful, under the direction of the tribunals of the domicile.

*Enohin v. Wylie*, 31 *Law Journ. Chancery*, 404; by Lord *Westbury*; to the contrary, Lords *Cranworth* and *Chelmsford*.

It was held, however, in *Irwin's Appeal* from Probate, 33 *Connecticut Rep.*, 128; and in *Dawes v. Head*, 3 *Pickering (Massachusetts Rep.)*, 147, that if there is a deficiency of assets in either jurisdiction, all the property must be divided among the creditors in both jurisdictions equally, and if there is a surplus in the foreign jurisdiction, it must be remitted to the domestic administrator or distributed there in recognition of, and in subordination to, the *title* and *rights* conferred by the will or the law of the domicile.

*Application of property to payment of decedent's debts.*

**695.** The nation having jurisdiction to grant authority to administer, has also exclusive jurisdiction to apply the movables and credits to which such authority extends, to the payment of debts due to persons subject to its jurisdiction.

Payment to the administrator of the creditor's domicile by a debtor domiciled elsewhere at the death, made at his own domicile, is no bar to an action for the same debt brought by an ancillary administrator, appointed in the debtor's domicile, even subsequently to the payment. *Young v. O'Neal*, 3 *Sneed's (Tennessee Rep.)*, 55; Anonymous, 2 *Amer. Law Review*, 398.

*Actions against foreign personal representative.*

**696.** A personal representative who after having law-

fully obtained possession of assets, becomes domiciled in the territory of any other nation, may be sued as such in its courts by persons entitled to such assets.

This rule was applied in favor of a creditor in *Baker v. Smith*, 3 *Metcalfe (Kentucky) Rep.*, 264: and of the next of kin in *Marrion v. Titsworth*, 18 *B. Monroe (Kentucky) Rep.*, 597.

In *Evans v. Tatem*, 9 *Sergeant & Rawle's (Pennsylvania) Rep.*, 259, it was held, however, that mere presence in the foreign State without the acquisition of a domicile there, would be sufficient to found the jurisdiction.

*When judgment of probate court, as to right of succession is conclusive.*

**697.** The determination of a court of probate, in respect to the right of succession to movables, is conclusive in the tribunals of other nations, in proceedings for the settlement of the same estate,<sup>1</sup> only<sup>2</sup> when the deceased was domiciled within the jurisdiction of the court at the time of his death.

<sup>1</sup> *Dogliani v. Crissini*, *Law Rep.*, 1 *House of Lords*, 301.

<sup>2</sup> The parties in interest in the place of principal administration are not bound by a judgment given in the place of ancillary administration. *Low v. Bartlett*, 90 *Massachusetts Rep.*, 259; *Ela v. Edwards*, 85 *Id.*, 48.

Consuls have power to administer on the estates of foreigners or decedents domiciled abroad, in the cases provided in Articles 338 and 340. The treaty between the United States and Honduras, July 4, 1864, (13 *U. S. Stat. at L.*, 704,) authorizes the consular officer of the nation of a foreigner dying in the country to which the consular officer is accredited to appoint curators to take possession of his estate, so far as the local laws will permit, for the benefit of the heirs and creditors, giving notice to the local authorities.

The treaty between the United States and Paraguay, Feb. 4, 1859, (12 *U. S. Stat. at L.*, 1096, Art. X.,) allows the consular officer to take charge of the property.

*Probate of will of property in foreign country.*

**698.** A will of a domiciled resident disposing only of property in a foreign country is entitled to probate in the country of residence, for the purpose of clothing the executor with power to take proceedings in the foreign country.

To the contrary, see *Matter of Coode*, *Law Rep.*, 1 *Probate & Divorce*, 449.

## CHAPTER LIII.

## ADMIRALTY.

ARTICLE 699. Extent of admiralty jurisdiction of a nation.

700. "Seas" defined.

701. Rules of decision in extra-territorial torts.

702. Uniform procedure in admiralty.

702a. Civil redress in case of collision.

702b. Criminal proceedings in case of collision.

The provisions of the Code in relation to jurisdiction over property, and the effect of judgments *in rem*, should seem to be adequate for the purpose of fixing the proper limits of the judicial power in cases of admiralty jurisdiction in its international aspects. The distinction between the jurisdiction of ordinary courts and those of admiralty, is mainly important as a question of municipal law, and even there is rapidly disappearing under recent legislation, the tendency of which is towards uniformity of remedies.

The admiralty jurisdiction in criminal cases is regulated by Chapter XLIX., on JUDICIAL POWER IN CRIMINAL CASES.

*Extent of admiralty jurisdiction of a nation.*

**699.** The admiralty jurisdiction of a nation in civil cases extends,

1. To all acts done upon the seas ;<sup>1</sup>
2. To all property constructed for or employed in navigating the seas ; and,
3. To all contracts relating to such property or for services on the seas, and to their incidents, when the persons or property are subject to the jurisdiction as defined by articles 309 and 312.

<sup>1</sup> *Story's Conf. of L.*, 423 g ; 423 h.

*"Seas" defined.*

**700.** The "seas" mentioned in the last article include:

1. Waters beyond the limits of any nation ; and,
2. Navigable waters, whether tidal or not, in any place within the limits of the nation.

The jurisdiction is not limited to tidal waters. *Genessee Chief v. Fitzhugh*, 12 *Howard U. S. Supr. Ct. Rep.*, 443 ; *Fretz v. Bull*, 12 *Id.*, 466 ; 2 *Parsons on Shipping*, Bk. 3, ch. I. ; *The Eagle*, 7 *Wallace's U. S. Supr. Ct. Rep.*, 15.

*Rules of decision in extra-territorial torts.*

**701.** In cases of collision between ships of different nations or other acts of damage to person or property, occurring beyond the jurisdiction of any nation, and in respect to which Chapter XXXIII., on COLLISION, does not afford a rule of decision, the extent of the remedy in damages to which the injured party is entitled, is determined by the law of the forum.

By the other provisions of this Code, (Articles 316 and 328,) the same rule must be applied to foreigners as to members.

*Uniform procedure in admiralty.*

**702.** All civil suits in the exercise of admiralty jurisdiction shall be commenced by summons. The cause of action shall be stated in a complaint, and the defense in an answer.

The determination of the controversy shall be by a judgment.

The provisional remedies, the modes of trial and of executing the judgment, shall be settled by a conference of judges in admiralty, one appointed by each nation, who shall agree upon uniform rules of procedure.

See *Report of British Judicature Commission*, 1869.

For a memorandum upon the recent increased jurisdiction and changes in the practice of the English admiralty, see *Accounts and Papers*, 1867, vol. LVII., (19.)

**702a.** In case of collision on the high seas, any one injured in person or property, and the legal representative of any one killed, may seek redress in the admiralty court of any country where the colliding ship or the greater part of its freight, or the owner of either, or any master, mariner, or other person complained of, may be found, at any time within three years after the collision. The court shall thereupon proceed, as in other cases in admiralty, and in conformity with the procedure established pursuant to the last article, to hear and decide the case, and may award such damages or other civil redress as shall be just. But before proceeding to judgment, the court shall address to an admiralty judge of the country to which the person or property

proceeded against belonged at the time of the collision, an invitation to sit in the court, in person or by substitute, if he will, at a convenient time and place to be agreed on, and take part in the decision. The judgment shall be executed at any place within the ordinary jurisdiction of the court or of the judge invited, and in all other courts shall be held valid and conclusive.

**702b.** In every case of collision, the party aggrieved, instead of proceeding for civil redress as in the last article mentioned, or in addition thereto, may, with the sanction of his own government, and in its name, proceed by a criminal action against any owner, master, mariner, or other person, by whose fault the collision occurred, and in such action the court, being such as is in the last article mentioned, may inflict punishment upon the offender by fine, not exceeding five thousand dollars, or imprisonment, not exceeding five years, or by both such fine and imprisonment.

# BOOK SECOND.

## WAR.

DIVISION THIRD.	BELLIGERENTS.
FOURTH.	ALLIES.
FIFTH.	NEUTRALS.

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### DIVISION THIRD.

#### BELLIGERENTS.

PART VII. THE COMMENCEMENT OF WAR.

VIII. THE CONDUCT OF WAR.

IX. THE TERMINATION OF WAR.

THE adoption of such a Code as is here proposed, contemplates the prolongation, and, if possible, the perpetuation, of a state of Peace, between the nations uniting in its adoption. It is among its chief objects, by defining rights and obligations that are now uncertain, to remove, or at least to diminish, the causes of war; by reducing, upon common consent, the excessive armaments of modern times, to reduce the temptations to war, and, by the establishment of tribunals of arbitration, to render a resort to it unnecessary and wrongful, in ordinary cases of difference.

The regulations for these purposes contained in the first Book of the Code, narrow the scope of the regulations necessary for the second Book. The adoption of the system would unite the assenting nations in an alliance for mutual advantage, under which it seems both practicable and safe for them to renounce, as against each other, the most mischievous of the old rights of war; and to concede to each other the exemptions which the most humane of modern treaties have recognized, and the ameliorations of the evils of war for which the most enlightened jurists have contended.

The influence of modern civilization has affected the usages of war in two opposite directions. It has increased the deadly character of combat

by scientific improvement of the instruments of war ; while on the other hand, it has diminished the surface upon which war acts in the destruction of life and property, by exempting, to a large degree, non-combatants and private property ; and, while increasing the rights and protection of neutrals, has practically increased, also, the stringency, if not the extent, of their obligations to refrain from aiding either party.

The best authorities are now discussing the question whether the time has not come when civilized nations should disavow the old maxim, that war makes every subject of one belligerent an enemy of every subject of the other ; and recognize the principle that war is a duel between nations, in which the governments and the persons impressed with their military character, are alone to be deemed enemies.

This change in the theory of the state of war, has already made great progress among publicists, and is now supported by eminent modern authorities, while it has received some practical sanction in the provisions of special treaties. It is submitted that it is both practicable and safe to make the modern doctrine the basis of a general Code.

In accordance with these considerations the general principles which have been followed in the preparation of the Articles of this Book, have been,

1. That as between the military forces of the belligerents, hostilities are sanctioned without other limits than those already recognized by the laws of civilized warfare, as modified by recent general conventions such as those respecting small explosive balls, and the treatment of sick and wounded. One qualification should be added, namely : forbidding the use of false colors and signals, as an act of bad faith ;

2. That nations, when they engage in war with each other, should confine their struggle to military measures ; and so far as possible leave undisturbed all undefended persons and places, all peaceful relations, and modes of intercourse, and all property, public or private, which does not directly subserve the purposes of war ;

3. That those nations which remain neutral, should not only refrain from active assistance, but should exert themselves to prevent their people from furnishing implements of warfare to either combatant. In accordance with the rule adopted in some recent treaties, and with usage in one or two cases, war material alone is declared contraband, and all other private property not engaged in illegal traffic, is protected from capture.

In considering the application of the provisions of this Book, it should be remembered that its object is not to state all the rules of public law which are in force during war, but only those rules unknown in time of peace which war calls into application. By Article 7, in the beginning of Book First, it is declared that the First Book treats of the relations of nations and of their members to each other, except as they are modified by a state of war ; and the Second treats of the modifications in these relations produced by a state of war. Therefore, the provisions for the protection of foreigners and their property which are contained in Book First, are not repeated here ; as they will continue uninterrupted in war as in peace, ex-



cept so far as the provisions of this Book would suspend them during war.

The notes, without attempting to refer to all the authorities, give a sufficient number to afford the reader a convenient clue to the discussions contained in the books concerning the various topics referred to, without burdening him with multiplied references.

## PART VII.

### THE COMMENCEMENT OF WAR.

**ARTICLE 703.** Provisions of Book on Peace continue in force except as modified.

704. "War" defined.

705. Nations, &c., are the only parties.

706. Civil war.

707. Insurgents may be treated as belligerents.

708. Insurgents may be recognized by foreign nations.

709. Declaration of war.

710. Response unnecessary.

711. "Reprisal" defined.

712. Negative reprisal.

713. Positive reprisal.

714. Positive reprisal treated as declaration of war.

715. Hostilities before declaration.

716. Positive reprisal in violation of provisions for preservation of peace.

*Provisions of Book on Peace continue in force except as modified.*

**703.** The provisions of Book First of this Code continue in force, notwithstanding the existence of war, except so far as it is otherwise expressly provided therein, or as they are modified by the provisions of this Book.

*"War" defined.*

**704.** The term "war," as used in this Code, designates a hostile contest at arms, between two or more nations, 'or communities claiming sovereign rights.'

Every such nation or community is termed a belligerent.

<sup>1</sup> Different definitions have been given by the writers, for different purposes. See a number of definitions collected by *Fioré Nouveau Droit International*, Ed. of Pradier Fodéré, v. 2, p. 239. He contends for a definition excluding unjustifiable war; but obviously the definition adopted in this Code must include every conflict which gives rise to the peculiar rights and duties of neutrals and belligerents. See also *Twiss' Law of Nations*, pt. II., p. 43, where various definitions are discussed.

It seems unnecessary to distinguish between ordinary public wars, and mixed, civil, or social wars (see *Grotius, Jure Belli ac Pacis*, liv. 1, ch. 3), any further than is done by Articles 705-708.

<sup>2</sup> The parties belligerent in a public war are independent nations. But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other. Prize Cases, 2 *Black's U. S. Supr. Ct. Rep.*, 667.

Revolutionary or insurrectionary wars, so far as necessary to be provided for in this Code, are the subject of Articles 705-708.

*Nations, &c., are the only parties.*

**705.** War is a relation of nation to nation, or of community to community, and does not affect the relations of individuals with each other, except within the limits allowed by this Book.

This is the general principle contended for by the best modern authorities, and its recognition has been the source of the greatest ameliorations yet introduced into the laws of war.

It used to be a familiar maxim of the books, that war makes all the subjects of one belligerent enemies of each and every subject of the other. *Halleck, Intern. Law & Laws of War*, p. 411, § 1. And the same rule was applied to strangers residing in the belligerent country, or coming to reside there, with knowledge of the existence of the war. *Twiss' Law of Nations*, Part II., p. 82. In the case of a civil war those persons were to be regarded as enemies who, though subjects or citizens of the lawful government, were residents of the territory under the power or control of the party resisting that government. *Miller v. United States*, 11 *Waller's U. S. Supr. Ct. Rep.*, 268.

The courts do not notice the friendly disposition of the individual, even in case of a rebellion. *Woods v. Wilder*, 43 *New York Rep.*, 164. This legally imputed hostility is now so far mitigated by treaty provisions, and by ameliorations in the usages of war, and is so much opposed to the tendency of modern opinion, that it seems proper to recognize a different rule. It is believed that the rule stated in the text more truly represents the better opinion of civilized nations, and more nearly conforms to the practice of hostilities at the present day. *Bluntschli (Droit International Codifié*, §§ 531, 532), says that strictly speaking the belliger-

ent *States* are the enemies. The *citizens* are not enemies of the hostile States, nor of each other; though they may be treated as such to the extent to which they take part in hostilities.

The chief significance of the maxim that in a state of war, civilians become enemies, has been in its application to contracts, and the confiscation of property. As to these subjects, see Articles 846, 835, subd. 5, and 906.

### *Civil War.*

**706.** Even though an insurrection in a nation interrupts the course of justice, so that the tribunals can not be kept open in the disaffected territory,<sup>1</sup> the insurgents are not entitled to belligerent rights, except so far as they are recognized as belligerents in accordance with article 708.

Prize Cases, 2 *Black's U. S. Supr. Ct. Rep.*, 667; *Shortridge v. Mason*, 2 *Amer. Law Review*, 95.

<sup>1</sup> Where the courts of justice are open, there is peace, in judgment of law. *Milligan's Cases*, 4 *Wallace's U. S. Supr. Ct. Rep.*, 1.

### *Insurgents may be treated as belligerents.*

**707.** A nation in which an insurrection exists may, without renouncing its claims of jurisdiction over the insurgents, or recognizing them as alien enemies or as having an established government, treat them as belligerents, and claim from foreign nations the performance of neutral duties.

This allows the nation at its option to invoke the principle that a civil war creates the same belligerent rights against neutrals, as a war between two separate and independent powers. Prize Cases, 2 *Black's U. S. Supr. Ct. Rep.*, 635. And see *The Mary Clinton*, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*) p. 556.

Whether rebels cruising on the high seas against the property of the parent State, can, in any case, be considered as pirates, see *Dana's Wheaton, Elements of Intern Law*, § 124, p. 196, note 84.

### *Insurgents may be recognized by foreign nations.*

**708.** When an insurrection exists in a nation, and the insurgents have an established government capable of maintaining relations with other nations, any other nation may recognize them as belligerents, without re-

cognizing their independence, and may assume a position of neutrality.

As to the right to recognize the *independence* of insurgents, see Article 962.

### *Declaration of war.*

**709.** No nation, uniting in this Code, shall commence a war against any nation whatever, without making public within its own territory, and as far as possible within the territory of the nation to be attacked, a declaration of war, assigning the reasons thereof, at least sixty days before committing the first act of hostility.

A *civil war* is never solemnly declared ; it becomes such by its accidents : the number, power and organization, of the persons who originate and carry it on. Where the party in rebellion occupy and hold in a hostile manner a certain portion of territory ; have declared their independence ; have cast off their allegiance ; have organized armies ; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest as a war. Prize Cases, 2 *Black's U. S. Supr. Ct. Rep.*, 635, per GRIER, J.

By the above Article, it is proposed to require express declaration in the case of public or international war only.

In the twelfth century, it was the established practice, formally to declare war, by a communication under the seal of the sovereign of one belligerent to the sovereign of the other. *Twiss' Law of Nations*, Part II., p. 57.

The same author says, that there can be no doubt that in the fourteenth century it was the established law of Europe, that an offensive war could not be rightfully commenced, without a previous declaration of hostilities.

*Wildman*, (*International Law*, v. 2. p. 8.) says, that since the peace of Versailles, in 1763, formal declarations of war of any kind seem to have been discontinued ; and all the legitimate and necessary consequences of war flow at once from a state of public hostilities duly recognized and explicitly announced by a domestic manifesto or State paper.

The importance of the question will be much diminished by the rule protecting private property at sea, as well as on land ; but it is in the interest of peace, as well as in accordance with the tendency of public opinion, to see that the line between the state of peace and that of war is clearly marked ; and, for this purpose, that a declaration in some form is required. The objection to requiring one is, that then acts of violence

committed on the high seas before declaration, will be piracy. *Twiss' Law of Nations*, Part II., p. 71. But this objection, so far as it ought to be allowed, will be met by Article 715.

It is the object of the above Article to require a declaration to be made public at home in all cases. This is in accordance with the present usages in respect to the mode of declaration. *Esposito v. Bowden*, 7 *Ellis & Blackburn's Rep.*, 763. And, to entitle a belligerent to insist on the performance of neutral duties by other neutral nations, a manifesto to them is necessary. *Twiss' Law of Nations*, Part II., p. 69. Accordingly, it is provided in Article 969, that a neutral nation comes under obligations as such to a belligerent, from the time that a notification of the hostilities is officially communicated to it by such belligerent, or from the time it voluntarily declares itself neutral.

Perhaps the clause requiring sixty days' notice should be restricted to wars between nations uniting in the Code. For the conflicting opinions on the necessity of declaration of war, see *Fioré Nouveau Droit Intern.*, par *Pradier-Fodéré*, vol. 2, pp. 251-260; *Ortolan, Diplomatie de la Mer*, vol. 2, pp. 12-23; *Phillimore's Intern. Law*, vol. 3, pp. 76-98; *Woolsey's Intern. Law*, § 115, p. 198; *Halleck, Intern. Law & Laws of War*, pp. 350-356.

In the treaty between Great Britain and Portugal, (Feb. 19, 1816, Art. XXXI. ;) and in the treaty between Great Britain and Brazil, (Aug. 17, 1827;) and in treaties concluded between Brazil and France, in 1826; Brazil and Prussia, in 1827; and Brazil and Denmark, in 1828; it was provided: "A rupture of pacific relations shall be regarded as having taken place, at the date, of recall or dismissal of the respective ambassadors."

And this arrangement is approved by *Twiss*, (*Law of Nations*, pt. II., p. 76, § 41,) as wise and reasonable, and one which, if even generally adopted, would prevent all disputes and difficulties as to the true date of the legal commencement of war.

### *Response unnecessary.*

**710.** When one nation declares war against another, the declaration becomes reciprocal, without response.

*Grotius, Laws of War & of Peace*, III., c. 3, § VIII; *Twiss, Law of Nations*, pt. II., p. 75; *Vattel, Droit des Gens*, liv. 3, ch. 4, § 57; *Halleck, Intern. Law & Laws of War*, p. 356.

### *"Reprisal" defined.*

**711.** A reprisal is any species of forcible means used by one nation, for procuring redress from another, without a hostile contest at arms.

Reprisals may be either negative or positive.

*Vattel* says, (*Droit des Gens*, liv. II., ch. 18, § 342,) that "reprisals are used between nation and nation, in order to do themselves justice, when they can not otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, together with interest and damages; or keep it as a pledge till the offending nation has refused ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears they are confiscated; and then reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced: and then also the effects seized may be confiscated."

*Wheaton* says, that reprisals are to be granted only in case of a clear and open denial of justice: they may include the following among other modes:

1. Laying an embargo or sequestration on the ships and goods, or other property of the offending nation, found within the territory of the injured State;

2. Taking forcible possession of the thing in controversy, by securing to oneself by force, and refusing to the other nation, the enjoyment of the right drawn in question;

3. Exercising the right of vindictive retaliation (*retorsio facti*), or of amicable retaliation (*rétorsion de droit*); by which last, the one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances. *Lawrence's Wheaton, Elements of Intern. Law*, pt. IV., ch. I., § 1; *Dana's Wheaton*, § 290; citing *Vattel*, liv. II., ch. 18; *Klüber, Droit des Gens Moderne de l'Europe*, § 234.

See also, *Twiss, Law of Nations*, pt. II., ch. I.; *Wildman's International Law*, vol. 1, p. 187; *Halleck Intern. Law & Laws of War*, p. 297.

### *Negative reprisal.*

712. A reprisal which consists in the refusal to perform a perfect obligation, or to permit the enjoyment of a right, is termed a negative reprisal.

### *Positive reprisal.*

713. A reprisal which involves the seizure or detention of persons or property, in violation of the provisions of this Code, or without authority of law, is termed a positive reprisal.

A general reprisal is said to be made by the aggrieved nation giving

authority to its military or other officers to seize persons or property of the other nation, in a particular place or wherever found.

A *special* reprisal is said to be made by giving such authority to particular individuals who have suffered injury from the government or members of the other nation. But these distinctions it seems unnecessary to define.

*Positive reprisal treated as declaration of war.*

**714.** A nation upon which a positive reprisal is made, may treat the same as a declaration of war against it, by making public within its own territory, and as far as possible, within the territory of the nation making the reprisal, a declaration that it is treated as an act of war.

Any reprisal may assume the character of war, if adequate satisfaction be refused by the offending nation. *Lawrence's Wheaton, Elements of Intern. Law*, pt. IV., ch. I., § 2; *Dana's Wheaton*, § 292.

*Hostilities before declaration.*

**715.** Every act of hostility, except in self-defense, committed before the expiration of sixty days after a public declaration of war, or without such declaration, is unlawful.<sup>1</sup> But this article shall not render punishable acts of subordinate officers committed by express authority of the nation, or under the immediate necessity of preventing or protecting from violence.<sup>2</sup>

<sup>1</sup> *Pradier-Fodéré* (col. of *Vattel* of 1863, v. 2, p. 403, note 1,) followed by *Fioré*, v. 2, p. 258, declares hostilities before declaration of war, "piraterie." But if committed by vessels of war, under orders, the actors could scarcely be punished as pirates. The offending nation should be held responsible.

<sup>2</sup> *Ortolan Diplomatie de la Mer*, v. 2, p. 12.

*Positive reprisal in violation of provisions for preservation of peace.*

**716.** No nation uniting in this Code shall commence war or make a positive reprisal on another nation, in violation of the provisions of Part IV. of this Code, entitled PROVISIONS FOR THE PRESERVATION OF PEACE.

## PART VIII.

### THE CONDUCT OF WAR.

**TITLE XXXII. MILITARY AUTHORITY.**  
**XXXIII. HOSTILITIES.**

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#### TITLE XXXII.

##### MILITARY AUTHORITY.

**CHAPTER LIV. Military law.**  
    LV. Martial rule.  
    LVI. Military occupation.

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#### CHAPTER LIV.

##### MILITARY LAW.

- ARTICLE 717.** "Military" defined.  
718. "Military law" defined.  
719. Jurisdiction of military tribunals over foreigners.  
720. Mutilation.  
721. Violations of provisions of the Code for protection of enemies or neutrals.  
722. Indemnity for excesses.  
723. Justification for violation of provisions of the Code for protection of enemies or neutrals.

*"Military" defined.*

**717.** The word "military," as used in this Code, applies only to public armed forces, by land or sea, except where a contrary intention plainly appears.



*“Military law” defined.*

**718.** Military law is the body of regulations prescribed by a nation for the government of its military forces.

This is generally known as *military law*, as distinguished from *martial rule*. See 1 *Kent's Commentaries*, 370, note; *Halleck, Intern. Law and Laws of War*, p. 373; *Mills v. Martin*, 19 *Johnson's (New York) Rep.*, 7; *Martin v. Mott*, 12 *Wheaton's U. S. Supr. Ct. Rep.*, 19.

*Jurisdiction of military tribunals over foreigners.*

**719.** Subject to the restrictions imposed by its own laws, the military tribunals of a nation are competent to punish foreigners :

1. When they are impressed with the military character of such nation, as defined by article 736, and commit offenses against its military law : or,

2. When they are enemies, active or passive, as defined by articles 746 and 747, and violate the provisions of Part VIII. of this Code, and fall into the power of such tribunals.

But the punishment inflicted can not be greater than that affixed for offenses of the same grade, when committed by members of the nation.

Whether their power shall or shall not extend to civilians or passive enemies who are members of the same nation, and to treason and such offenses which are cognizable by the civil courts, is a question of local law. For the rules on this subject adopted by European nations, see *Maurice Block, Dictionnaire de l'adm. Fr. s. roe etat de siege*, referring to the law of 1849. *Escrive*, same title. The American rules are discussed by Cushing, in 8 *Opinions of United States Attorneys-General*, 366; and see *Halleck, Intern. Law and Laws of War*, p. 373, § 25. In the *Milligan Case*, (4 *Wallace's U. S. Supr. Ct. Rep.*, 1,) it was held that a civilian could not be subjected to military trial. And in 12 *Opinions of U. S. Attorneys-General*, p. 128, it was declared that a citizen not in the military service can not be tried by military commission in Washington, for an offense committed in New York, within the jurisdiction of the civil courts, which were in full possession and exercise of their powers.

*Mutilation.*

**720.** Mutilation or disfigurement of the person must not be inflicted as a punishment.

By the rules heretofore existing, *branding* is allowed.

*Violations of provisions of the Code for protection of enemies or neutrals.*

**721.** The military authorities of a belligerent are bound to use all their power to enforce obedience, by all persons under their control, to those provisions of Part VIII., and of Division V. of this Code, which are for the protection of enemies or neutrals; and the nation is bound, through its military or other tribunals, to punish those guilty of violating the same.<sup>1</sup> Such punishment must be at least equal to that prescribed for offenses of the same grade against itself or its members.

<sup>1</sup> *Bluntschli, Droit International Codifié*, § 575.

*Indemnity for excesses.*

**722.** A nation is bound to afford all the indemnification possible for crimes and excesses committed by its forces in violation of the laws of war, or for want of discipline.

See *Halleck, Intern. Law and Laws of War*, p. 442, § 22.

No nation can treat with cruelty or deprive of their property the members of another nation, whom some calamity, such as the distress or stranding of a ship, throws within its borders, without wrong and just claim of redress. *Woolsey, International Law*, § 59, p. 94; and see *Id.*, § 125, p. 214.

*Justification for violation of provisions of the Code for protection of enemies or neutrals.*

**723.** The orders of a superior officer are a justification to an inferior officer or to a soldier, in disobeying the provisions of Part VIII., and of Division V. of this Code. The superior is, however, responsible.

“An officer or soldier, acting under the orders of his superior, not being necessarily and manifestly illegal, would be justified by his orders.” *Keighley v. Bell*, 4 *Foster & Finlason's Rep.*, 790.

## CHAPTER LV.

## MARTIAL RULE.

**ARTICLE 724.** Martial rule and its effect.

725. Martial rule needs no proclamation.

726. Consuls.

727. Duty of magistrates and civil officers.

*Martial rule and its effect.*

**724.** Martial rule is the exercise of the will of the commander.<sup>1</sup> It must nevertheless be exercised within the limits of the provisions of this Book of the Code, and of the military law to which the forces are subject ; but within these limits it suspends all laws,<sup>2</sup> so far and so long<sup>3</sup> as they come in conflict with it.

Martial rule, or the law applicable to the state of siege, is regulated by positive law, in the French and other continental systems. See *M. Block, Dic. de l'administration Francaise* ; 8 *Opinions of U. S. Attorneys-General*, 366 ; *Halleck, Int. Law and Laws of War*, p. 374, § 26. But these regulations seem unnecessary in an International Code, except so far as their subjects are embraced in the provisions of this Chapter.

<sup>1</sup> Argument in the Milligan Case, *Washington Reporter*, May 7, 1866 ; and the decision of the court, 4 *Wallace's U. S. Supreme Ct. Rep.*, 1.

The will of the commander is ordinarily called martial law, but in the proper sense it is not law at all.

Wellington, in one of his despatches, from Portugal in 1810, explained it in this manner :

"I think it would be desirable to define with precision our ideas respecting the establishment of military law, before we determine to alter the established law of the country in any case.

"The following questions are worth consideration and decision on this topic. What is military law ? Military law, as applied to any persons, excepting the officers, soldiers, and followers of the army, for whose government there are particular provisions of law in all well regulated countries, is neither more nor less than the will of the general of the army. He punishes either with or without trial for crimes either declared to be so, or not so declared by any existing law, or by his own orders. This is the plain and common meaning of the term military law. Besides the mode of proceeding above described, laws have been made

in different countries, at different times, to establish and legalize a description of military constitution.

"The commander-in-chief, or the government, has been authorized to proceed by military process—that is, by court martial, or council of war—against persons offending against certain laws, or against their own orders, issued generally for the security of the army, or for the establishment of a certain government or constitution odious to the people among whom it is established.

"Of both descriptions of military law there are numerous instances in the history of the operations of the French army during the revolution; and there is an instance of the existence, both of the first mentioned description, and of the last mentioned, in Ireland, during the rebellion of 1768, when the people were in insurrection against the government, and were to be restrained by force."

And in his speech on the Ceylon affair, he repeats the description :

"I contend that martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all; therefore, the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules, and regulations, and limits, according to which his will is to be carried out. Now, I have, in another country, carried out martial law—that is to say, I have governed a large proportion of the population of a country by my own will. But then what did I do? I declared that the country should be governed according to its own national law, and I carried into execution that, my so declared will."

See also *Halleck Intern. Law and Laws of War*, p, 373, § 25; *Forsyth's Cases and Opinions in Constitutional Law*, 207-216; and Appendix.

<sup>2</sup> "Martial law is quite a distinct thing from ordinary military law, and is founded on paramount necessity, and proclaimed by a military chief." 1 *Kent's Commentaries*, 377. *Hallam*, (*Constitutional History*, I., 326, 3rd ed.,) says, "It has been usual for all governments, during an actual rebellion, to proclaim martial law, or the suspension of civil jurisdiction." It supersedes all civil proceedings which conflict with it, but does not necessarily supersede those which do not. *Bouvier's Law Dictionary*, Art. *Military Law*.

"It is, in fact, the law of social self-defense, superseding, under the pressure, and therefore under the justification, of an extreme necessity, the ordinary forms of justice. Courts-martial under martial law, or rather during the suspension of law, are invested with the power of administering that prompt and speedy justice in cases presumed to be clearly and indisputably of the highest species of guilt. The object is self-preservation by the terror and the example of speedy justice. But courts-martial which condemn to imprisonment and hard labor belie the necessity under which alone the jurisdiction of courts-martial can lawfully exist in civil society." Opinion of Mr. Sergeant Spankie, found in *Hough on Courts-Martial*.

"Martial law is merely a cessation, from necessity, of all municipal

law, and what necessity requires it justifies. An alien *amy* hostilely invading a territory while in arms, might lawfully be put to death; and when taken prisoner, if his immediate execution were necessary to the suppression of insurrection, he might be executed immediately, without any reference to municipal law. But the insurrection being quelled and tranquility restored, and the ordinary tribunals proceeding regularly in the administration of justice, an alien *amy* who had been taken in arms could not be lawfully put to death, either with or without the form of being tried by a court-martial;" but must be dealt with according to the regular course of justice. . . . "This case is clearly distinguishable from that of a foreigner assisting in a civil war. Where an insurrection against a government has become so formidable as to assume the aspect of an equally-balanced civil war, the laws of war are to be observed between the government and the insurgents; and native-born subjects taken prisoners could not properly be tried as traitors. And even were an alien *amy* in the ranks of the insurgents, he would be dealt with as a native-born subject." Opinions of Sir John Dodson, Sir John Campbell, and Sir R. M. Rolfe, in *Cases and Opinions in Constitutional Law*, by Forsyth, p. 199.

Martial law can never be enforced for the ordinary purposes of civil or even criminal justice, except, in the latter, so far as the necessity arising from actual resistance compels its adoption. Opinions of Sir John Campbell, and Sir R. M. Wolfe, in *Cases and Opin. in Const. Law*, by Forsyth, p. 198.

The right conclusion upon the whole matter seems to be this: "Martial law may be justifiably imposed as a terrible necessity, and an act of self-defense; under it there is a suspension of civil rights, and the ordinary forms of trial are in abeyance. Under it a man in actual armed resistance may be put to death on the spot, by any one acting under the orders of competent authority; or, if arrested, may be tried in any manner which such authority shall direct. But if there be an abuse of the power so given, and acts are done under it, not *bona fide* to suppress rebellion or in self-defense, but to gratify malice or in the caprice of tyranny, then for such acts, the party doing them is responsible. *Forsyth's Cases and Opin. in Const. Law*, p. 214; and see *Finlason's Commentaries on Martial Law*, London, 1867. Military necessity includes all those measures which are indispensable for securing the ends of the war, and which are not forbidden by this Code, or the military law of the power by which the measures in question are taken. See *Lieber's Instructions for the Government of Armies of the United States*, ¶¶ 6, 7.

Interference of the military power with the persons or property of others than those impressed with the military character, actually engaged in unlawful hostilities, or spies, or pirates, when called in question in the civil tribunals, can only be justified on the ground of a danger immediate and impending, or a necessity urgent for the public service, such as will not admit of delay, and when the action of the civil authority would be too late in providing the means which the occasion calls for. *Harmony's Case*, 13 *Howard's U. S. Supr. Ct. Rep.*, 116.

The creation of a commission or board to decide or advise upon the subject gives no increased sanction to the act. As necessity compels, so that necessity alone can justify it. The decision or advice of any number of persons, whether designated as a military commission, or board of officers, or council of war, or as a committee, proves nothing but greater deliberation; it does not make legal what would otherwise be illegal. Argument in *Milligan's Case*, *Washington Reporter*, May 7, 1866.

<sup>2</sup> Compare *Johnson v. Duncan*, 3 *Martin's (Louisiana) Rep.*, 520, *Lieber's Instructions for the Government of Armies of United States*, ¶ 6.

The municipal laws of a country occupied by a conquering power remain in force until suspended, superseded, or otherwise changed by order of the conqueror. *Wingfield v. Crosby*, 5 *Coldwell's (Tennessee) Rep.*, 241; *Rutledge v. Fogg*, 3 *Id.*, 554, and authorities there cited; *Campbell v. Hall*, *Lofft*, 655; *Cowper*, 204.

Martial rule may be expressly continued by treaty of peace, but only to the extent of occupation.

### *Martial rule needs no proclamation.*

**725.** Martial rule is justifiable only by an absolute and overruling necessity. When such necessity exists, the rule may be exercised, without a previous proclamation, and in any place actually possessed by a belligerent, whether an enemy or friend,<sup>1</sup> but in no other place; and it is always exercised at the peril of the commander.

See *Bluntschli, Droit Intern. Codifié*, § 539; *Lieber's Instructions*, ¶ 1.

Although some authorities say that a proclamation is necessary, it should not be so regarded.

If a general or commander-in-chief has the right to enforce martial rule upon those who are not members of his army, he may enforce it without as well as with a proclamation. All the purpose which that effects is to give notice of the fact.

There are, however, cases in which a general may use force for other purposes than to compel submission in the opposite army, and obedience in his own. The maxim which gives the reason and the extent of the power, is "*Necessitas quod cogit, defendit.*" This is a maxim not peculiar in its application to military men; it applies to all men under certain circumstances.

Private persons may lawfully tear down a house, if necessary, to prevent the spread of a fire. But this is not because there is such a thing as fireman's law, but because necessity requires it. Indeed, the maxim is not confined in its application to the calamities of war and conflagration. A mutiny, breaking out in a garrison, may make necessary for its suppression, and therefore justify, acts which would otherwise be un-

justifiable. In all these cases, however, the person acting under the pressure of necessity, real or supposed, acts at his peril. The correctness of his conclusion must be judged by courts and juries, whenever the acts and the alleged necessity are drawn in question. Argument in the *Milligan Case*, *Washington Reporter*, May 7, 1866.

A declaration of martial law, *even in one's own country*, is the mere announcement, and not the creation of the fact. See *Halleck, Int. Law and Laws of War*, p. 372, § 24; and opinions of *Sir John Campbell* and *Sir R. M. Rolfe*, in *Cases and Opinions in Constitutional Law by Forsyth*, p. 198.

<sup>1</sup> See the *Milligan Case*, 4 *Wallace's U. S. Supr. Ct. Rep.*, 1.

### *Consuls.*

**726.** Consuls are subject to martial rule in the same cases, and to the same extent, as other persons.

*Lieber's Instructions*, ¶ 8.

### *Duty of magistrates and civil officers.*

**727.** It is the duty of the civil officers and other residents of an invaded country to yield obedience to martial rule, within the limits of the provisions of this Book, so long as the military possession continues, under pain of expulsion; but oaths of allegiance cannot be required.<sup>1</sup>

<sup>1</sup> By the rules heretofore existing, the commander of a hostile force may require the magistrates and civil officers of the enemy's country within his occupation, to take an oath to yield allegiance to his nation, so long as its occupation continues. *Lieber's Instructions*, ¶ 26. But it is submitted that the multiplication of oaths is needless, and the object is better attained by a positive requirement of law.

The obligations imposed on the non-combatant inhabitants of a section of country passed over by an invading army, cease when the military occupation ceases; and any pledge or parole given by such persons, in regard to future service, is void. *General Orders of U. S. War Department*, 1863, v. 2, p. 237, No. 207, § 4.

## CHAPTER LVI.

## MILITARY OCCUPATION.

The provisions of this Chapter relate to possession under *martial rule* pending hostilities. The rules applicable to cases of completed conquest rest upon different principles, and are stated in Part IX., upon THE TERMINATION OF WAR.

ARTICLE 728. "Military occupation" defined.

729. Allegiance suspended by military occupation.

730. Limit of power of belligerent.

731. Civil and criminal law within military occupation.

732. Persons held to service or labor.

733. Effect of reconquest on civil and political rights.

*"Military occupation" defined.*

**728.** Military or belligerent occupation, as used in this Book, is a possession by the military power of a belligerent, sufficiently firm to enable such belligerent to execute its will within the limits of the occupation, either by force, or by acquiescence of the people, for an indefinite future, subject only to the chances of war.<sup>1</sup>

But the modification of such occupation, resulting from an armistice, or other compact with the enemy, does not affect the power of the belligerent over persons and property within such limits, further than is provided by this Book, or by the compact itself.<sup>2</sup>

<sup>1</sup> *Dana's Wheaton, Elem. of Intern. Law*, § 347, note 169, p. 436; *Halbeck, Intern. Law and Laws of War*, p. 778, &c., and authorities cited.

<sup>2</sup> See Article 778, as to the effect of armistice or truce.

*Allegiance suspended by military occupation.*

**729.** The allegiance of the members of a belligerent nation resident within the limits of the military occu-



pation of the enemy, is suspended, so far as it is inconsistent with the lawful authority of the enemy.

*Dana's Wheaton, Elem. of Intern. Law*, note 169 ; *Halleck, Intern. Law and Laws of War*, p. 791, and authorities cited.

*Limit of power of belligerent.*

**730.** Except as otherwise provided in this Book, the authority of a belligerent, occupying the territory of the enemy, extends no further and no longer than his actual power extends.

*Dana's Wheaton, Elem. of Intern. Law*, note 169.

Even the retroaction of completed conquest only goes so far as to give permanency to the acts of the conquerer, done during military occupation. *Halleck, Intern. Law and Laws of War*, p. 815.

See Part IX., on THE TERMINATION OF WAR.

*Civil and criminal law within military occupation.*

**731.** The civil law of the people of a territory which is held by a hostile military occupation, remains unchanged, until modified in accordance with the organic law, or by a treaty of peace ; but the hostile nation may introduce its own criminal law, within the limits of its occupation.

Suggested by *Twiss, Law of Nations*, Part II., p. 128.

*Persons held to service or labor.*

**732.** The status of persons, and the obligations of service or labor, are not affected by the presence of a belligerent, who may nevertheless for military purposes suspend such relations during the continuance of the military occupation.

*Lieber, (Instructions, ¶¶ 42, 43)* says that slavery is abolished by the invasion of a free army ; but this is not sustained by the authorities, or the principles of international law.

"In barbarous times, the laws of war authorized the reduction to slavery of a conquered people. These laws have been softened under the influences of Christianity and civilization, till now it is the settled public law of the Christian and civilized world that *the conquest of a nation by another makes no change in the property or the personal rights and relations of the conquered people*. 'The people change their allegiance,' says Chief justice Marshall, (7 *Pet.*, 87, *U. S. v. Churchman*;) 'their relations to

their ancient sovereign are dissolved, but their relations to each other and their rights of property remain undisturbed.' One change only is effected, and that is, that one sovereign takes the place of the other. In a civil war sovereigns are not changed, unless the rebellion is successful." Argument in *McCardle Case*, *Forsyth's Cases and Opinions in Constitutional Law*, pp. 491, 519.

*Effect of reconquest on civil and political rights.*

**733.** When a belligerent regains and maintains possession of territory taken from his control during war :

1. All the acts of political administration done by order of the invader, and all modifications made in the constitution and the political relations of the people, unless made by the will and consent of the nation, cease to be in force ;<sup>1</sup>

2. All executed transactions, whether transfers of property,<sup>2</sup> judgments rendered, or other acts, if consistent with the organic law of the nation, and lawful at the time when they took place, remain valid.

<sup>1</sup> *Fioré Nouveau Droit International*, v. 2, p. 352.

<sup>2</sup> *Fioré* says, these transactions are not valid by law, but ought to be confirmed by the sovereign. *Ib.* And see *Bluntschli, Droit Intern. Codifié*, § 731.

The exception in case of an expulsion of the enemy by a third power, in which case the authority of such power is held to some extent paramount, is not here recognized. See *Bluntschli*, § 729.

As to acts of courts of an insurgent power, see *Hickman v. Jones*, 9 *Wallace's U. S. Supr. Ct. Rep.*, 197.

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## TITLE XXXIII.

### HOSTILITIES.

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|---------|--------|---|
| CHAPTER | LVII.  | Who may wage hostilities.                 |
|         | LVIII. | Against whom hostilities may be waged.    |
|         | LIX.   | The instruments and modes of hostilities. |
|         | LX.    | Truce and armistice.                      |
|         | LXI.   | Medical service.                          |
|         | LXII.  | Religious service.                        |
|         | LXIII. | Prisoners.                                |

- CHAPTER LXIV. Hostilities against property.  
 LXV. Contraband of war.  
 LXVI. Visitation, search and capture.  
 LXVII. Blockade.  
 LXVIII. Prize.  
 LXIX. Effect of a state of war on obligations of nations and their members.  
 LXX. Effect of a state of war upon intercourse.  
 LXXI. Effect of a state of war upon the administration of justice.
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## CHAPTER LVII.

## WHO MAY WAGE HOSTILITIES.

- ARTICLE 734, 735. Authority to commit hostilities.  
 736. Persons impressed with military character.  
 737. Temporary want of authority.  
 738. Compulsory service.  
 739. Savage allies.  
 740. Defensive hostilities.  
 741. Privateering abolished.  
 742. Punishment of privateering.  
 743. Pirates and brigands.

*Authority to commit hostilities.*

**734.** All acts of hostility are unlawful,<sup>1</sup> except when committed under authority of a belligerent,<sup>2</sup> or in self-defense.

<sup>1</sup> *Talbot v. Jansen*, 3 *Dallas*, *U. S. Supr. Ct. Rep.*, 133, 160.

An alien, a native of a State at peace with Great Britain, and not in the service of any State at war with that government, who levies war against it within its dominions, is deemed guilty of treason, although he enters it in a hostile manner. *Forsyth's Cases and Opinions in Constitutional Law*, p. 199.

The authority is usually that of the nation of which the individual is a member; but the principle includes the authority of any nation, as in the case of mercenaries, or persons of one nation, enlisting in the military service of another, against a third.

War should be regarded as subsisting between nations, not individuals. *Bluntschli, Droit Intern. Codifié*, § 530, &c.

*Puffendorf*, (bk. 8, ch. 6, § 21.) observes that it is "a part of the war to appoint what persons are to act in a hostile manner against the enemy,"

and how far ; and, in consequence, no private person hath power to make devastation in an enemy's country, or to carry off spoil or plunder, without permission from his sovereign ; . . . for to be a soldier, and to act offensively in a hostile manner, a man must be commissioned by public authority." And see *Cases and Opin. in Const. Law*, by Forsyth, p. 479.

War is waged between governments by persons whom they authorize, and is not waged against the passive inhabitants of a country. *Woolsey's International Law*, § 125, p. 214.

*Portalis*, in his speech at the installation of the council of prizes, (see *Heffter*, § 119,) said : "The right of war is founded on this, that a people, in the interests of self-conservation, or for the sake of self-defense, will, can, or ought to use force against another people. It is the relation of things, and not of persons, which constitutes war ; it is the relation of State to State, and not of individual to individual. Between two or more belligerent nations, the private persons of which these nations consist are enemies only by accident ; they are not such as men, they are not even as citizens, they are such solely as soldiers."

To the same effect are Talleyrand's words in a dispatch to Napoleon, of November 20, 1806, (see *Woolsey's Intern. Law*, § 130, note, p. 225.) "Three centuries of civilization have given to Europe a law of nations, for which, according to the expression of an illustrious writer, human nature can not be sufficiently grateful. This law is founded on the principle, that nations ought to do to one another in peace, the most good, and in war, the least evil possible.

"According to the maxim that war is not a relation between a man and another, but between State and State, in which private persons are only accidental enemies, not such as men, nor even as members or subjects of the State, but simply as its defenders, the law of nations does not allow that the rights of war, and of conquest thence derived, should be applied to peaceable unarmed citizens, to private dwellings and properties, to the merchandise of commerce, to the magazines which contain it, to the vehicles which transport it, to unarmed ships which convey it on streams and seas ; in a word, to the person and the goods of private individuals.

"This law of war, born of civilization, has favored its progress. It is to this that Europe must ascribe the maintenance and increase of her prosperity, even in the midst of the frequent wars which have divided her."

*The same.*

**735.** Subject to article 737, no persons other than those impressed with a military character may lawfully wage hostilities, except in self-defense.

*Halleck*, *Int. Law and Laws of War*, p. 386 ; *Vattel*, *Droit des Gens* b. 3, ch. 15, § 224 ; and *Id.*, ch. 5, § 70 ; 1 *Gallison's U. S. Circ. Ct. Rep.* 563 ; *Lawrence's Wheaton, Elements of Intern. Law*, pp. 626, 627, pt. iv., ch. ii., §§ 8, 9 ; *Dana's Wheaton*, §§ 356, 357.

*Halleck*, (above,) says that the hostile acts of bands of men, self-organized and self-controlled, are not belligerent acts, but crimes. There must be, as stated in Article 734, the authority of a power capable of making war, to justify any person in committing offensive hostilities.

*Persons impressed with military character.*

**736.** The following persons and no others are deemed to be impressed with the military character :

1. Those who constitute a part of the military<sup>1</sup> forces of the nation ;<sup>2</sup> and,
2. Those who are connected with the operations thereof, by the express authority of the nation.<sup>3</sup>

<sup>1</sup> "Military" is defined by Article 717.

<sup>2</sup> *Lawrence's Wheaton, Elem. of Intern. Law*, p. 627, pt. iv., ch. ii., § 8 ; *Dana's Wheaton*, § 356 ; *Bluntschli, Droit Intern. Codifié*, § 569.

<sup>3</sup> *Wheaton*, as above. This will include subsidiary forces ; camp followers, &c. In modern warfare partisan and guerrilla bands are regarded as outlaws, and may be punished by a belligerent as robbers and murderers. *Halleck, Int. Law and Laws of War*, 386, 387 ; *Heffter, Droit International*, § 126 ; 3 *Phillimore's Intern. Law*, § 96 ; *Lieber's Instructions for the Government of Armies of the United States*, section iv. But if employed by the nation, they become part of its forces. *Halleck*, p. 386, § 8.

*Fioré*, on this point says that the army, which may consist of regulars, volunteers, mercenaries, troops of allies, &c., must be organized, disciplined and subjected to the command of the public authority. *Fioré, Nouveau Droit International*, v. 2, p. 277.

As to the status of franc-tireurs during the Franco-German war, 1870, Count Bismarck declared to the French government that "only men who can be recognized within gunshot, as soldiers, shall be considered and treated as such,"—and "that all those who, not being on all occasions and at a proper distance recognizable as soldiers, may kill or wound any Prussians, shall be tried by court-martial." *Foreign Relations of the United States*, 1870, p. 142.

*Temporary want of authority.*

**737.** Inhabitants of a country invaded, who spontaneously unite in arming to oppose invasion,<sup>1</sup> or who, under military organization,<sup>2</sup> and for political reasons, without motives of private gain, take part in hostilities existing between belligerents,<sup>3</sup> are not to be treated as criminals, unless after being required by the enemy to lay down their arms or to join the regular military forces within a reasonable time, they fail to do so.

<sup>1</sup> *Halleck*, (*Int. Law and Laws of War*, p. 388,) says the proper distinction in relation to inhabitants rising *en masse*, was made by Wellington, in his invasion of the South of France, (1814.) He required the peasants engaged in partisan warfare to take arms openly and join Soult, or stay peaceably at home.

<sup>2</sup> Persons waging offensive hostilities on land, without express authority of a belligerent, should be treated as criminals if they act without military organization, whatever the circumstances or motives.

<sup>3</sup> *Bluntschli*, (*Droit International Codifié*, § 570, and note,) inclines to the opinion that an unauthorized corps, which, believing they have a just cause, adopt a military organization, and fight for a political end, are to be treated as lawful enemies, not criminals: and he instances the corps of Garibaldi, in the Italian wars of 1859 and 1866, and in the expeditions of 1860 and 1867. The above Article would allow this, subject to the right of the enemy to require them to join the forces.

*Lieber*, (*Instructions*, ¶ 85,) lays down a stricter rule. He says, that "war-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they, if discovered and secured before their conspiracy has matured to an actual rising, or to armed violence.

### *Compulsory service.*

**738.** Except as provided in article 358,<sup>1</sup> a nation can not exact military service from any persons but its own members.

<sup>1</sup> The reference is to the Article in the BOOK ON PEACE, which regulates the obligation of military service on the part of foreigners.

The inhabitants of a conquered territory are not deemed members of the victorious nation, within the meaning of this Article, except when the latter, after complete conquest, has proclaimed its intention and manifested its power to hold and annex such territory. *Lieber's Instructions*, ¶¶ 23, 93; *Bluntschli*, *Droit International Codifié*, § 576.

See Part IX., concerning THE TERMINATION OF WAR.

### *Savage allies.*

**739.** The employment, against a civilized enemy, of savage allies, who are not subjected to the rules of war, contained in this Code, and to the military law of the employing power, is unlawful.

This seems to be the principle recognized on this subject.

*Dana*, (*Wheaton, Elem. of Intern. Law*, § 343, note 166,) says, that the

employment, though open and acknowledged, of savage allies who do not recognize the laws of war and of nations, against a civilized enemy, is discountenanced by the best jurists and statesmen of modern times.

But it is not a valid objection that individual soldiers are of a barbarous or pagan religion, when they are under the responsible command of officers of a civilized nation, and subjected to the articles of war.

Woolsey, (*International Law*, § 127, p. 217,) says, that "troops who are accustomed to an inhuman mode of warfare, and belong to a savage race, can not be trusted to wage war according to the spirit of humanity, and ought not to be employed."

### *Defensive hostilities.*

**740.** Subject to article 868, defensive hostilities, on sea or land, though without public authority, are lawful.

Halleck, *Intern. Law and Laws of War*, p. 391, and authorities there cited; *Lawrence's Wheaton*, *Elem. of Intern. Law*, pt. iv., ch. ii., § 8, p. 627; *Dana's Wheaton*, § 356.

### *Privateering abolished.*

**741.** Privateering is and remains abolished; and offensive hostilities at sea can only be waged by the public armed ships of a belligerent.

<sup>1</sup>Conference of Paris, 1856. Nearly all the nations of Europe have acceded to this rule; see preliminary note to Chapter LXIV., concerning HOSTILITIES AGAINST PROPERTY. The United States have always been willing to adopt it, if coupled with the exemption of private property not contraband.

By the convention between the United States and

The Dominican Republic, Feb. 8, 1867, Art. XXV., 15 *U. S. Stat. at L.* 180.

Venezuela, Aug. 27, 1860, " XXV., 12 *Id.*, 1143.

Bolivia, May 13, 1858, " XXV., 12 *Id.*, 1003,

it is provided, that, no member of either nation shall apply for or take any commission or letters of marque, for arming any ship or ships to act as privateers, against the other nation, or against its citizens, people, or inhabitants, or any of them, or against the property of any of its inhabitants, from any prince or State with which such other nation shall be at war; and if any member of either nation shall take such commission or letters of marque, he shall be punished according to their respective laws.

And in the treaty between the United States and Guatemala, March 3, 1849, Art. XXV., 10 *U. S. Stat. at L.*, (*Tr.*) 1, it is provided that such persons may be treated as *pirates*.

Similar provisions are to be found in many other modern treaties.

*Punishment of privateering.*

**742.** A private ship, waging offensive hostilities whether with or without a commission from a nation, is a piratical ship; and all persons committing such hostilities are punishable as pirates.

Depredations on the high seas, without authority from any sovereign State, are acts of piracy. *Lawrence's Wheaton, Elements of Intern. Law*, p. 246, pt. II., ch. II., § 15; *Dana's Wheaton*, § 122.

If privateering be not abolished it ought to be declared that, "Any ship which takes a commission from any other power than the nation whose character it bears, as defined by Chapter XX., on NATIONAL CHARACTER OF SHIPPING, is a piratical ship, and all persons committing hostilities under such commission, are punishable as pirates by any nation. See *Halleck, Intern. Law & Laws of War*, p. 396; and the treaty of 1786, between France and Great Britain.

It is plain, that taking a commission from each of two belligerents is piracy. 1 *Phillimore's Intern. Law*, § 358. See also *Lawrence's Wheaton*, pp. 250-254, note 80. *Forsyth's Cases and Opinions in Constitutional Law*, p. 116.

Taking a commission from both of two allied nations against a common enemy is equally condemned by *Kent, (Commentaries*, vol 1, p. 100; citing as authorities for this rule, *Valin's Com.*, tome 2, 235-236; *Bynkershock*, c. 17; *Sir L. Jenkins' Works*, 714;) although *Halleck*, (p. 396,) makes a distinction here, and holds that this is not piracy.

The taking of a commission from one belligerent by a neutral ship ought equally to be forbidden, according to *Vattel, Droit des Gens*, bk. 3, ch. 15, § 229.

An act of Congress of the United States, prohibits citizens to accept within the jurisdiction of the United States a commission, or any person not transiently within the United States to consent to be retained or enlisted, to serve a foreign State in war against a government in amity with the United States. It likewise prohibits citizens from being concerned without the limits of the United States, in fitting out or otherwise assisting any private vessel of war, to cruise against the subjects of friendly powers. Act of Congress, April 20, 1818, ch. 83, p. 100. And see *Kent's Commentaries*, p. 100. Similar prohibitions are contained in the laws of other countries. See the "Austrian Ordinance of Neutrality," Aug. 7, 1803, Arts. 2, 3.

The foreign enlistment acts of Great Britain and the United States, which are permanent statutes, impose severe penalties on citizens or residents, who receive commissions, equip privateers, or enlist men for service in any foreign war. 9 *U. S. Stat at L.*, p. 175.

The above rule would include all three classes of cases.

*Pirates and brigands.*

**743.** Pirates and brigands are criminals not entitled



to the protection extended to enemies by the laws of war.

A military organization is not enough. *Bluntschli, Droit International Codifié*, § 513. If, however, such forces join, and are received by the belligerent power, they become enemies.

Partisans, says *Lieber, (Instructions, ¶ 81,)* are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body, for the purpose of making inroads into the territory occupied by the enemy. If captured they are entitled to all the privileges of prisoners of war.

Men or squads of men, who commit hostilities, whether by fighting or by inroads for destruction or plunder, or by raids of any kind, without commission, without being part of the organized hostile army, and without sharing continuously in the war, but who do so with intermittent returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers, such men or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but should be treated summarily as highway robbers or pirates.

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## CHAPTER LVIII.

### AGAINST WHOM HOSTILITIES MAY BE WAGED.

ARTICLE 744. "Enemy" defined.

745. Individual enemies.

746. "Active enemies" defined.

747. "Passive enemies" defined.

748. Active enemies resisting with arms.

749. Non-combatants.

750. Passive enemies are inviolable.

751. Passive enemies, sick and wounded leaving armed place.

752. Disarming places.

753. Persons communicating with the enemy.

"*Enemy*" defined.

744. Except where a different intent plainly appears, the term "enemy," as used in this Code, without qualification, designates the hostile nation or community, and all individuals identified with it, as active enemies, according to the definition of article 746.

*Individual enemies.*

**745.** Individuals, regarded as enemies, are either,

1. Active ; or,
2. Passive.

*“Active enemies” defined.*

**746.** The following persons, and no others, are deemed active enemies :

1. Those impressed with a military character, by the belligerent,<sup>1</sup> as defined by article 736.
2. Those who, not being impressed with such character, are unlawfully waging hostilities ;
3. Those who unlawfully give aid and comfort to the opposing belligerent ;<sup>2</sup>
4. Spies ; and,
5. Pirates.

<sup>1</sup> If a soldier of foreign origin take service in the standing army of a nation, he becomes, for the time of his service, a member *de facto* of the nation, for all belligerent purposes. *Twiss, Law of Nations*, pt. II., p. 81.

<sup>2</sup> The phrase “aid and comfort to the enemies” of the nation, alone, does not include compulsory assistance, nor service in purely civil functions ; nor mere expression of opinion, nor mere acts of charity, done with intent to relieve immediate suffering, and not in aid of the cause. It designates overt acts, done with intent to further the war. 12 *Opinions of U. S. Attorneys-General*, pp. 160, 204. *Non-combatants*, who make forcible resistance, or violate the rules of warfare, give military information to their friends, or obstruct the forces in possession, are liable to be treated as combatants. *Dana's Wheaton, Elem. of Intern. Law*, § 345, note 168 ; see also, *Woolsey's Intern. Law*, § 130.

It is not essential to constitute giving aid and comfort, that the effort should be successful, and actually render assistance. Overt acts, which, if successful, would advance the interest of the enemy, amount to aid and comfort. *United States v. Greathouse*, 2 *Abbott's United States Reports*, 364.

*“Passive enemies” defined.*

**747.** Passive enemies are all members of the hostile nation, or other belligerent community, and all domiciled residents therein, who are not active enemies.

*Active enemies resisting with arms.*

**748.** Subject to the restrictions contained in this

Book, it is lawful for a belligerent to attack and kill or subdue active enemies, while they are resisting with arms in their hands.

The rule that hostilities can only be waged, on the territory of a belligerent, and on the high seas, or in other places not within the jurisdiction of a neutral nation, is contained in the provisions of Division V., concerning NEUTRALS.

*Non-combatants.*

**749.** Persons impressed with the military character, whose duty does not require them to take part in hostilities, such as those employed in judicial, commissary and medical departments, are exposed to the dangers of general hostilities, but can not lawfully be separately attacked, so long as they do not take part in actual hostilities.

*Bluntschli, Droit International Codifié, § 578.*

*Passive enemies are inviolable.*

**750.** Passive enemies can not be made the objects of hostilities,<sup>1</sup> except as provided in this Title,<sup>2</sup> or incidentally when they are personally involved in the consequences of contests with active enemies.

<sup>1</sup> "No use of force against an enemy is lawful, unless it is *necessary* to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore exempted the persons of the sovereign and his family, the members of the civil government, women and children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and generally, all public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms or guilty of some misconduct in violation of the usages of war by which they forfeit their immunity." *Lawrence's Wheaton, Elem. of Intern. Law*, pp. 593-596; *Dana's Wheaton*, § 345, citing, *Vattel, Droit des Gens*, liv. 3, ch. 8, §§ 145-147, 159; *Klüber, Droit des Gens Moderne de l'Europe*, pt. II., tit. 2, sec. 2, ch. 1, §§ 245-247. According to some treaties and decrees, fishermen catching fish for food are also exempt.

<sup>2</sup> They are liable to be taken prisoners of war, (see Articles 753 and 801,) and to visitation and search. (see Article 865.)

*Halleck, (Intern. Law & Laws of War, p. 427, § 3.)* enumerates as exempt from direct operations of war; 1. Feeble, old men; women and children, and the sick; 2. Ministers of religion; men of science and letters; pro-

professional men ; artists, merchants, mechanics, agriculturists, laborers,—in fine, all non-combatants or persons who take no part in the war, and make no resistance to arms. This exemption continues only so long as they refrain from hostilities or inciting hostilities, pay military contributions and submit to military authority.

*Passive enemies, sick and wounded, leaving armed place.*

**751.** Passive enemies, and sick and wounded, may always be sent out of an armed place ; and in taking their departure, they, with their attendants, must be respected and protected by the belligerents.

See Convention of Geneva, Art. VI., ¶ 5.

*Disarming places.*

**752.** The passive enemies in a particular place may be disarmed and restrained, when necessary for the security or success of the belligerent force.

*Halleck, Intern. Law & Laws of War, p. 428, § 5.*

*Persons communicating with the enemy.*

**753.** Persons who, within the military lines, make any communication with the enemy, direct or indirect, intended to subserve the purpose of the war, may be expelled from the lines,<sup>1</sup> or may be treated as active enemies.

<sup>1</sup> *Lieber, (Instructions, ¶ 98.)* says, that all unauthorized or secret communications with the enemy are treasonable.

The same author, (§§ 90-91, (says of war traitors, (persons in a place or district under martial law, who, unauthorized by the military commander, give information of any kind to the enemy or hold intercourse with him,) that they are always severely punished. If their offense consist in betraying to the enemy anything concerning the condition, safety, operations or plans of the troops holding or occupying the place or district, their punishment is death.

If the citizen or subject of a country or place invaded or conquered, give information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war traitor, and death is the penalty of his offense. This rule seems too harsh. It is sufficient to subject them to the treatment of active enemies, except where they come within the category of spies.

The rules respecting spies, war traitors and war rebels, are applied without distinction of sex. *Lieber's Instructions, ¶ 102.*

## CHAPTER LIX.

## THE INSTRUMENTS AND MODES OF HOSTILITIES.

It has not been thought best, in framing these provisions, to attempt the statement of a theoretic distinction between those forms of force which are and those which are not unlawful, but only to enumerate those which it seems practically important to prohibit.

Concealed modes of extensive destruction are allowable; as, torpedoes planted to blow up ships, or strewed over the ground before an advancing enemy, and mines; hot shell are permissible, and bombshells to set fire to ships, camps or forts; and it is thought that steam or boiling water may lawfully be thrown upon boarders, by a ship on the *defensive*.

The employment of assassins; the introduction of infectious or contagious diseases, the poisoning of springs, the use of poisoned weapons or of chemical compounds, which may maim or torture the enemy, or of any material which owes its efficacy to a distinct quality of producing pain, or of causing or increasing the chances of death or disability, and which can not be remedied by the usual medical and surgical applications for forcible injuries, or averted by retreat or surrender, are unlawful. *Dana's Wheaton, Elem. of Intern. Law*, § 343, note 166.

## ARTICLE 754. Unlawful weapons.

755. Private gratification forbidden.

756. Unlawful hostilities.

757. Notice of bombardment.

758. Retaliation, when allowed.

759. Mode of retaliation not to be barbarous.

760. Passive or disabled enemies and prisoners.

761. Bribery and intrigue.

762. Good faith in keeping engagements.

763. "Stratagems" defined.

764. Unlawful stratagems.

765. Lawful stratagems.

766. Piratical use of false colors, &amp;c.

767. "Spies" defined.

768. Employment and punishment of spies.

769. Guides.

770. Punishment of guides.

771. Solicitation of desertion unlawful.

772. Enlistment of deserters no protection from punishment.

*Unlawful weapons.*

**754.** The following are unlawful weapons :

1. Those which are poisoned ;<sup>1</sup>
2. Those which contain explosive material, whether in musket balls or in any other missile intended especially for the person ;<sup>2</sup>
3. Those which contain chemical compounds intended to torture ; and,
4. All other weapons intended to cause needless suffering, or wounds unnecessarily difficult to heal.<sup>3</sup>

<sup>1</sup> *Klüber, Droit des Gens*, § 244 ; *Bluntschli, Droit Intern. Codifié*, § 557.

<sup>2</sup> The International Military Commission, in a session at St. Petersburg, agreed to prohibit the use in time of war of all explosive projectiles weighing less than four hundred grammes. *Army and Navy Journal*, New York, Nov. 28, 1868.

<sup>3</sup> *Fioré Nouveau Droit Intern.*, v. 2, p. 279.

Of this class are : *Boulets à chaines*, which, according to *Bluntschli*, (*Droit Intern. Codifié*, § 560,) are forbidden only on land.

*Boulets à bras.*

*Boulets ramés*, mentioned by *Bluntschli*, § 560, note.

*Balles crénelées.*

*Le petit plomb.*

*Mitraille*, (de faire charger le canon avec des morceaux de fer ou de verre, ou avec des clou.) (*Mitraille proprement dite.*)

According to *Klüber*, mitraille in the ordinary acceptation of the term, and, even in case of necessity, of pieces of lead, not perfectly round, are allowable. But according to *Bluntschli*, § 560, they are forbidden at sea.

*Verre pilé.*

*De faire charger le fusils à deux balles ; à deux mortiers de balles ; ou fondues avec des morceaux de verre ou de chaux.*

*Boulets rouges ou de couronnes foudroyantes ; cercles poissés.*

These are prohibited by treaty in some maritime wars. *Klüber*, § 244, note a.

*Fleches barbelés.* *Bluntschli, Droit Intern. Cod.*, § 558.

*Klüber*, (*Droit des Gens*, § 244,) says, that the customs of war condemn the use of chain shot and bar shot, shooting bits of iron, brass, nails, &c., the loading of muskets with two balls, with jagged balls, or with balls mixed with glass or lime.

Special treaties have prohibited as between the parties the use of chain, bar, and hot shot, as well as of pitch rings, (*cercles poissés.*)

Grape, canister and shrapnel shell, or spherical case shot are used in the United States navy. *Ordinance Instructions of 1866*, p. 76, §§ 271-275.

*Private gratification forbidden.*

755. All transactions for individual gain at the expense of the enemy,<sup>1</sup> all insults to the religion, honor, language or manners of the enemy;<sup>2</sup> all assassination<sup>3</sup> or other acts of private revenge, or connivance at such acts, and all violence for private purposes,<sup>4</sup> are unlawful.

*Lieber's Instructions for the Government of Armies of the United States*, ¶ 11.

<sup>1</sup> Such as extortion of money for private use. *Lieber's Political Ethics*, bk. VII., § 24.

<sup>2</sup> *Bluntschli, Droit Intern. Codifié*, § 577

<sup>3</sup> *Klüber, Droit des Gens*, § 244; *Bluntschli, Droit Intern. Codifié*, § 561. *Lieber's Instructions*, ¶ 148; *Dana's Wheaton, Elem. of Intern. Law*, § 343, note 166.

<sup>4</sup> Such as the gratification of lust. *Lieber's Political Ethics*, bk. VII., § 24.

*Unlawful hostilities.*

756. The following acts are unlawful,<sup>1</sup> except when inflicted in retaliation, within the limits prescribed by article 758 :

1. Offering reward for the death of any person ;<sup>2</sup>
2. Proclaiming any person an outlaw ;<sup>3</sup>
3. Incendiarism, except of military structures ;<sup>4</sup>
4. Bombardment of defenseless places ;<sup>5</sup>
5. All wanton injuries to property, not subject to hostilities according to the provisions of this Book ;
6. All unnecessary or avoidable injury to the person of others than active enemies,<sup>6</sup> or to property mentioned in article 840, even when contained in fortified places besieged or bombarded ;<sup>7</sup>
7. Refusing quarter to those who surrender and lay down their arms,<sup>8</sup> or killing or wounding a defenseless<sup>9</sup> or unresisting<sup>10</sup> enemy ; except in the cases where the refusal of quarter is necessary by way of retaliation, allowed by article 758, or when the punishment of death is ordered by a competent tribunal for an offense committed by such enemy.

8. Mutilation or other wanton injuries of the person of a prisoner :

9. Firing on outposts,<sup>1</sup> sentinels or pickets, except under express orders to drive them in :

10. The use of poison<sup>2</sup> or other means, to vitiate food, drink or atmosphere, or to spread contagious or infectious disease ; and,

11. Starving<sup>3</sup> the enemy by cutting off supplies of food or water.

<sup>1</sup> It is lawful, however, to take advantage of the disorder or weakness caused by such acts, when committed by third parties. *Bluntschli, Droit Intern. Codifié*, § 563, note.

<sup>2</sup> *Bluntschli, Droit Intern. Codifié*, § 562 ; *Lieber's Instructions for the Government of Armies of United States*, ¶ 148.

*Klüber, (Droit des Gens*, § 244,) says, putting a price on the head of the sovereign or general-in-chief is forbidden.

<sup>3</sup> The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor. *Lieber's Instructions*, ¶ 148.

<sup>4</sup> *Bluntschli, Droit Intern. Codifié*, § 563, note.

<sup>5</sup> This, it seems, should be prohibited, though it has been regarded as allowable.

<sup>6</sup> Such are the violation of women, the despoiling of tombs, the profaning of places of worship, &c. *Klüber, Droit des Gens*, § 244.

<sup>7</sup> *Lieber's Instructions*, ¶ 35.

<sup>8</sup> By the present rules of international law, says *Halleck (Int. Law & Laws of War*, p. 429, § 6, citing many authorities,) quarter can be refused the enemy, only, in cases where those asking it have forfeited their lives by some crime against the conqueror, under the laws and usages of war. But *Lieber, (Instructions*, ¶ 60,) says, that a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible for him to incur himself with prisoners. See also *Bluntschli, Droit Intern. Codifié*, § 580.

According to the same authorities, troops known to give no quarter receive none ; (*Bluntschli*, § 581 ; *Lieber*, ¶ 62 :) and if the character of a prisoner, as a member of such troops, is unknown at the time of capture, he may be put to death, if it be discovered within three days after the battle in which quarter was given under such misapprehension. *Lieber*, ¶ 66.

This Article would establish a more humane rule.

<sup>9</sup> *Bluntschli, Droit Intern. Codifié*, § 561, and note.

<sup>10</sup> *Halleck, Intern. Law and Laws of War*, p. 426, § 2 ; p. 429, § 6 ; *Lieber's Instructions*, ¶ 71 ; *Bluntschli, Droit Intern. Codifié*, § 385.



Some earlier authorities allow the killing of prisoners who have been taken and who can not be safely kept. *Vattel* allows this, only, where no promise to spare them has been given ; or where safety absolutely demands it. But *Halleck*, (p. 440, § 20,) condemns such an act, in any case, as infamous at the present day.

<sup>11</sup> *Lieber's Instructions*, ¶ 69.

<sup>12</sup> *Halleck, Intern. Law and Laws of War*, p. 392 ; *Bluntschli, Droit Intern. Codifié*, § 557. This applies equally to the poisoning, and to the diseases of animals. *Klüber, Droit des Gens*, § 244. The use of poison in any way is forbidden. *Lieber's Instructions*, ¶¶ 16, 70 ; compare, however, *Lieber's Political Ethics*, Bk. VII., § 25. Some earlier authorities sanction the use of poison. See *Wildman's Intern. Law*, v. 2, p. 24.

<sup>13</sup> By the existing rules this is allowed. *Dana's Wheaton*, § 343, note 166 ; and *Lieber's Instructions*, ¶ 18, allow also driving back non-combatants whom the commander of a besieged place expels. But these extreme measures, it should seem, ought not to be continued.

### *Notice of bombardment.*

**757.** Before bombarding any city or town, a commander must give notice to its authorities of his intention to do so ; and must allow a reasonable time for the removal of all who are not active enemies.

*Lieber*, (*Instructions*, ¶ 19,) says that it is no infraction of the laws of war to omit such notice ; for surprise may be a military necessity.

In the Franco-Prussian war, the Germans hesitated to resort to a general bombardment of Paris, and it is said, decided to reduce the city by famine instead of fire, if possible. Circular of Count Bismarck. *Annual Register*, for 1870, p. 187.

The rule that the bombardment of a fortified town should be preceded by notice was asserted by the representatives of neutral powers in Paris, during the siege ; and they accordingly united in a note to Count Bismarck, requesting that "in accordance with the recognized principles and usages of the law of nations, steps may be taken to permit their countrymen to place themselves and their property in safety." *Foreign Relations of the United States*, 1871, pp. 284, 295. This was refused by Count Bismarck, on the ground that ample warning and opportunity to leave had been given. *Id.* pp. 293, 363.

### *Retaliation, when allowed.*

**758.** Upon satisfactory evidence that the rules of lawful warfare are violated by an enemy, and if there be no other means of restraining his excesses, retaliation may, after deliberation, be justly resorted to in order to compel him to observe the law.

*Lawrence's Wheaton, Elem. of Intern. Law*, pp. 607, 608; *Dana's Wheaton*, § 347, citing *Vattel, Droit des Gens*, liv. III., ch. 8, § 142; ch. 9, §§ 166--173; *Marten's Précis du Droit des Gens Moderne de l'Europe*, liv. VIII., ch. 4, §§ 272--280; *Klüber, Droit des Gens*, Part II., tit. 2, sec. 2, ch. 1, §§ 262--265. *Bluntschli, Droit Intern. Codifié*, § 567; *Lieber, Instructions*, ¶ 28.

In the war of the rebellion, the president of the United States issued an order, July 30, 1863, in view of alleged barbarities inflicted upon prisoners by the enemy, declaring that for every soldier of the United States killed in violation of the laws of war, a rebel soldier should be executed; and for every one enslaved or sold into slavery by the enemy, a rebel soldier should be placed at hard labor on the public works, until the other should be released and treated as a prisoner of war. *General Orders of U. S. War Department*, v. 2, p. 323, No. 252.

### *Mode of retaliation not to be barbarous.*

**759.** Retaliation for barbarous hostilities, such as mutilation, deprivation of food or drink, or enslavement of prisoners, the use of unlawful weapons, or other cruelties, can not be made by inflicting the same barbarities; but may be by inflicting death.

This principle is declared in *Lieber's Instructions*, ¶ 58, in respect to enslavement.

### *Passive or disabled enemies and prisoners.*

**760.** The refusal of quarter, when authorized, does not justify killing passive enemies, or active enemies already disabled on the ground, or those who are already prisoners.

*Lieber's Instructions*, ¶ 61; *Bluntschli, Droit Inter. Codifié*, § 582.

### *Bribery and intrigue.*

**761.** Bribing or attempting to bribe any enemy impressed with the military character of the hostile nation, or any of its officers, agents or servants; and clandestinely corresponding with a faction in the enemy's forces or people, are unlawful.

*Halleck* says, the latter is not unlawful; though the former is not honorable.

*Klüber, (Droit des Gens, § 244.)* declares the corrupting of the generals and functionaries of the enemy to be unlawful, as well as engaging its subjects in treason or sedition.

*Woolsey*, (*International Law*, § 127, p. 218,) says, that "to lead the officers, counsellors, or troops of an enemy to treachery by bribes, or to seduce her subjects to betray their country, are temptations to commit a plain crime, which no hostile relation will justify. Yet to accept of the services of a traitor is allowable:" citing *Vattel*, *Droit des Gens*, III., 10, §§ 180, 181.

The laws of war impose the punishment of death on one who attempts to bribe an officer or induce a soldier to desert. *Halleck*, *Intern. Law & Laws of War*, p. 409, § 27: citing *Phillimore*, *Int. Law*, v. 3, § 106.

*Bluntschli*, (*Droit Intern. Codifié*, § 564, and note,) says, that the instigation of treason in the officers and soldiers of the enemy is not to be countenanced, but to instigate acts not dishonorable in themselves, such as political offenses in other cases, is allowable.

It should seem proper, however, for the nations uniting in a Code to recognize the obligation to respect the rights of allegiance in regard to civilians as well as soldiers.

### *Good faith in keeping engagements.*

**762.** Lawful promises made to the enemy must be kept, in good faith.

*Bluntschli*, *Droit Intern. Codifié*, § 566; *Fioré*, *Nouveau Droit Intern.*, v. 2, p. 356.

### *"Stratagems" defined.*

**763.** Stratagems are snares laid for an enemy, or deceptions practiced on him.

### *Unlawful stratagems.*

**764.** The following are unlawful stratagems:

1. Any false communication, by word, sign or otherwise, addressed directly to the enemy;<sup>1</sup>

2. The use of false colors,<sup>2</sup> false uniforms,<sup>3</sup> and false signals 'of distress';

3. Disguise, or using indicia of neutrality or inactivity, for the purpose of committing acts of hostility, with the appearance of a peaceful intent;<sup>4</sup> and,

4. All other acts of perfidy<sup>5</sup> and treachery.

<sup>1</sup> This is a more strict rule than is at present applied, but with the distinctions made in the next Article, is not more strict than good faith seems to require. The exigencies of lawful negotiations require that communications *directly to the enemy* should be truthful.

<sup>2</sup> This is different from the rule heretofore existing. *Bluntschli*, (*Droit*

*Intern. Codifié*, § 565, and note,) says, it is not now unlawful to deceive the enemy by using his own colors and uniform; but before actual contest the true character must be disclosed.

Lieber, (*Instructions*, ¶ 65,) says, the use of the enemy's emblems of nationality for the purpose of deceiving him in battle, is perfidious.

False colors at sea are now allowed to be used in sailing, even in pursuit, but the commission of any act of hostility under false colors is piracy. Halleck, (*Intern. Law and Laws of War*, p. 404,) says, that firing the affirming gun is not an act of hostility within this rule; but cites *Massé* and *Hautefeuille* as of a contrary opinion.

Ortolan, (*Diplomatie de la Mer*, v. 2, pp. 29, 30,) says, that it is not dishonorable, at sea, to draw the enemy into combat, or escape a superior enemy, by raising a false flag, but it is forbidden to commence or continue the combat under any other flag than the true one. Formerly it was forbidden to fire the warning gun under a false color, but now the French law only requires the French flag to be displayed before firing shot.

See also on this subject, 2 *Wildman's Intern. Law*, 25; *The Peacock*, 4 *Robinson's Rep.*, 187; *Pistoye et Duverdy Traité des Prises*, tit. 5, ch. 1; *Massé Droit Com.*, t. 1, § 307; *Hautefeuille, Droit des Nations Neutres*, t. 4, p. 8; *Valin, Traité des Prises*, ch. 1, sec. 1, § 9; *Lebeau, Nouveau Code des Prises*, t. 6, pp. 223, 283; *De Cussy Droit Maritime*, liv. 1, tit. 3, § 25.

By the present Article, a capture accomplished by the use of false colors would be unlawful. The protection of neutrals seems to require that the false use of neutral colors should not be resorted to by belligerents; and the enlarged immunity herein proposed for neutrals would make this restriction still more important.

<sup>3</sup> Lieber, (*Instructions*, ¶ 64,) says, that if uniforms captured from the enemy are used, a striking mark or sign must be adopted for distinction. Troops who fight in the enemy's uniform without such mark could expect no quarter. *Bluntschli, (Droit Intern. Codifié*, § 583,) seems to apply this rule only to the use of such uniforms in battle.

<sup>4</sup> For an instance of the use of false signals in distress, see *Vattel, Droit des Gens*, liv. iii., c. 10, § 178. False signals not addressed to the enemy may perhaps be regarded as a part of lawful stratagem.

<sup>5</sup> The principle which it is desired to establish is, that since new immunity from the evils of war is proposed for passive enemies and neutrals, belligerents shall not perfidiously take advantage of this as a means of stratagem. The case cited by Ortolan, (*Diplomatie de la Mer*, v. 2, p. 31,) of the British vessel of war in 1800, whose officers and men took possession of a Swedish vessel, a neutral, and in her surprised two Spanish frigates at anchor, is,—so far as the offense against the Spanish forces is concerned,—only an extreme case of pursuit under false colors. If neutrals and passive enemies are to be respected, it should seem proper to forbid using any indicia of neutrality or inactivity as a cover for hostilities.

Disguise for the purpose of getting within the enemy's lines without

force, to put a person to death, is unlawful ; but disguise of ships or forces, for gaining a position or making a capture with force, is not.

<sup>6</sup> It is the breach of good faith, express or implied, which constitutes perfidy. *Halleck, Intern. Law and Laws of War*, p. 402.

*Fioré, (Nouveau Droit Intern., v. 2, p. 282,)* concludes that stratagem is permissible only when it does not violate the principles of morality, pledged faith, and the general rules of war.

### *Lawful stratagems.*

**765.** The following are lawful stratagems:

1. False representations, addressed to any other than the enemy, though intended to come to his knowledge ;<sup>1</sup>

2. Feigning assent to an infamous proposal, and making false communications in response thereto ; and,

3. Surprise, without disguise or treachery.

<sup>1</sup> *Halleck, Intern. Law and Laws of War*, p. 405.

*Wildman, (Intern. Law, v. 2, p. 24,)* says, unqualifiedly, that disguising men and ships, except firing under false colors, as well as spreading false news, and the like, are lawful.

No rule of war forbids a commander to circulate false information, and to use means for deceiving his enemy with regard to his movements. *Woolsey, Intern. Law, § 127.*

### *Piratical use of false colors, &c.*

**766.** Acts of hostility committed by a ship under false colors, or by the use of a neutral ship, or accomplished by the use of false colors, or of false signals, addressed to the enemy, are acts of piracy.

See note to Article 764; and compare Article 61.

### *“ Spies ” defined.*

**767.** Spies are persons who, with disguise or other deception, go peaceably among the enemy to discover his condition.

*Lieber's Instructions, ¶ 88.*

*Halleck, (Intern. Law and Laws of War, p. 406,)* includes in his definition the act of communicating information so acquired to the employer. But it is not necessary to show that done or even intended, in order to constitute a spy.

An open reconnoissance is not forbidden. *Bluntschli, Droit. Intern. Codifié, § 630.*

*Employment and punishment of spies.*

**768.** It is lawful to employ spies without corrupting public or military officers ;<sup>1</sup> but a spy is punishable with death if captured while acting as such,<sup>2</sup> or in going or returning.

<sup>1</sup> *Fioré, Nouveau Droit Intern.*, v. 2, p. 283.

<sup>2</sup> The act of Congress of the United States, of March 3, 1863, § 38, punishes with death all persons found in time of war lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere.

*Lieber, (Instructions, ¶ 83,)* says, that a scout,—that is, a person who with disguise or other deception lurks within *or about* the lines of the enemy to obtain information,—is punishable with death.

But it should seem that one who lurks *without* the lines ought not to be punished for that alone.

A successful spy or war-traitor safely returned to his own army and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a dangerous person.

*Guides.*

**769.** A belligerent may compel any inhabitant to serve as guide or pilot ; and one who serves his own nation as guide, or who by compulsion serves the enemy as guide, is not punishable therefor.

*Lieber's Instructions, ¶¶ 93-95 ; Bluntschli, Droit Intern. Codifié, §§ 634, 635.*

If a citizen of a hostile and invaded district *voluntarily* serve as a guide to the enemy, or offer to do so, he is deemed a war-traitor, and may be punished with death.

A citizen serving voluntarily as a guide against his own country commits treason, and may be dealt with according to the law of his country.

*Punishment of guides.*

**770.** Guides or pilots who intentionally mislead, are punishable with death.

*Lieber's Instructions, ¶ 97 ; Bluntschli, Droit International Codifié, § 636.*

*Solicitation of desertion unlawful.*

**771.** It is unlawful to solicit desertion from military

duty ; but, except during a truce or armistice,<sup>1</sup> deserters may be received and enlisted into service.

*Pioré, Nouveau Droit Intern.*, v. 2 p. 282.

<sup>1</sup> 2 *Wildman's International Law*, p. 27 ; citing *Grotius*, III., 21, viii. *Puffendorf*, VIII., 7, xi.

*Enlistment of deserters no protection from punishment.*

**772.** A deserter who enlists with the enemy is not thereby protected from punishment according to the military law of the nation whose service he deserted, if he fall into its power again.

*Lieber's Instructions*, ¶ 48 ; *Woolsey's International Law*, § 128, p. 220.

## CHAPTER LX.

### TRUCE AND ARMISTICE.

**ARTICLE 773.** "Truce" and "armistice" defined.

774. Authority to make a truce.

775. Authority to make armistice.

776. Publication of truce.

777. Interpretation.

778. Effect of armistice or truce.

779. Enforcing.

780. Expiration.

781. Unauthorized breach.

782. Recommencing hostilities.

783. Flags of truce.

784. Effect of capitulation.

*"Truce" and "armistice" defined.*

**773.** The term "truce," as used in this Code, means a suspension of hostilities as to a part of the forces on either side, or as to one or more places.

The term "armistice" means a suspension of all hostilities between the belligerents.

*Halleck, (Intern. Law and Laws of War, p. 654,) and Bluntschli, (Droit Intern. Codifié, §§ 687, 689,) distinguish between a suspension of arms, as being a temporary and local cessation of hostilities by a detachment of*

troops, and a truce, as a suspension of hostilities for a considerable length of time, and for a general purpose.

*Authority to make a truce.*

**774.** A truce may be concluded between the commanders of the belligerent forces respectively, extending to their own commands, without special authority.

*Authority to make armistice.*

**775.** An armistice can be concluded only by agreement of the governments of the respective nations.

In the exercise of a general implied power incidental to their official stations, generals and admirals may suspend or limit the exercise of hostilities within the sphere of their respective military and naval commands, by means of special licenses to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms, or capitulations for the surrender of a fortress, city, or province. These conventions do not, in general, require the ratification of the supreme power of the State, unless such ratification be expressly reserved in the act itself. *Lawrence's Wheaton, Elem. of Intern. Law*, p. 442, § 3; *Dana's Wheaton*, § 254, citing *Martens, Précis*, liv. II., ch. 2, §§ 49, 51, 65; *Heffter, Droit International*, § 87; *Grotius, de Jure Belli ac Pacis*, lib. III., cap. 22, §§ 6-8; *Vattel, Droit des Gens*, liv. II., ch. 14, § 207.

The conclusion of a general armistice, by the general or admiral commanding in chief the military or naval forces of the State, applicable to all hostilities in every place, and to endure for a long or indefinite period, requires either the previous special authority of the superior power of the State, or a subsequent ratification by such power. *Lawrence's Wheaton*, p. 685, § 19; *Dana's Wheaton*, § 401, citing 1 *Kent's Commentaries*, 59; see *Halleck, Intern. Law & Laws of War*, p. 655; *Executive Documents*, 31st Cong., No. 17, p. 601; *Klüber, Droit International*, §§ 277, 278; *Bluntschli, Droit Intern. Codifié*, §§ 688, 689. This amounts, in effect, to a temporary peace, except that it leaves undecided the controversy out of which the war originated.

Such acts or agreements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions*. These must be confirmed by express or tacit ratification. *Lawrence's Wheaton*, p. 442, § 4; *Dana's Wheaton*, § 255.

*Publication of truce.*

**776.** A truce or armistice binds the principals from the time of making the same, but no others until it has been published. Persons ignorantly violating it are not responsible civilly or criminally, but the principal



whose duty it was to publish it is bound to make compensation to the party injured.

<sup>2</sup> *Wildman's International Law*, 28.

To prevent the difficulties and damage that might arise from acts committed in ignorance of a truce, it is usual to fix a prospective period for the cessation of hostilities, with reference to distance and the situation of places. *Lawrence's Wheaton, Elem. of Intern. Law*, p. 686, § 21; *Dana's Wheaton*, § 402; 1 *Kent's Commentaries*, p. 160; citing *Vattel, Droit des Gens*, bk. 3, c. 15, §§ 239, 244.

### *Interpretation.*

**777.** Where the language of a truce or armistice is ambiguous, that construction is to be preferred which extends the benefits thereof.

<sup>2</sup> *Wildman's Intern. Law*, 27; citing *Grotius, de Jure Belli ac Pacis*, III., 21, 4; *Vattel, Droit des Gens*, III., § 244.

### *Effect of truce or armistice.*

**778.** Unless the terms of a truce or armistice indicate a different intention of the parties, the following rules apply :

1. It takes effect from the moment it is agreed on ;<sup>1</sup>
2. Neither party, during its continuance, can do any act directly injurious to the other ;<sup>2</sup>
3. Neither party can take advantage of the cessation of hostilities to gain a different position, or to threaten or strengthen a besieged place by works or military supplies, or to do any other act which could not safely be done in the midst of hostilities ; but all things are to remain as they were in the places contested, and of which the possession was disputed at the moment of concluding the truce or armistice ; and,
4. Subject to the foregoing restrictions, either party may continue general active preparations for war, by constructing or repairing fortifications, raising troops and gathering supplies.

<sup>1</sup> *Fioré Nouveau Droit Intern.*, v. 2, p. 356.

<sup>2</sup> 1 *Kent's Commentaries*, pp. 160, 161; *Vattel, Droit des Gens*, liv. III., ch. 16, §§ 245-251. *Bluntschli, (Droit Intern. Codifié, § 692,)* says, that a

belligerent may take possession of places which the enemy has abandoned, but not those which he accidentally omits to occupy or guard.

It is lawful during a truce, unless its terms forbid, to withdraw forces or collect reinforcements, but not to advance or occupy unguarded positions, or receive deserters. 2 *Wildman's Intern. Law*, 27.

It is obvious that the contracting parties may, by express compact, derogate in any respect from these general conditions. For a full treatment of this subject in detail, see *Halleck, Intern. Law and Laws of War*, pp. 657-660; *Phillimore's Intern. Law*, III., §§ 117, 118, 197-8; 1 *Kent's Commentaries*, 16, 180; *Heffter, Europ. Volker.*, §§ 142-3; *Martin's Précis du Droit des Gens*, §§ 293-4; *Wildman's Intern. Law*, II., 27. See also *Lieber's Instructions for the Govern. of Armies of United States*, ¶¶ 135-147; *Bluntschli, Droit Intern. Codifié*, § 691.

The computation of time is regulated by Article 994.

### *Enforcing.*

**779.** Any party to a truce or armistice may interfere to prevent any other party from doing any act in violation thereof.

The hostilities it seems must be confined to what is necessary for such prevention, unless the acts are a breach of conditions which terminate the truce. *Halleck, Intern. Law and Laws of War*, p. 658.

### *Expiration.*

**780.** A truce or armistice is terminated, either,

1. By the expiration of the time limited by its terms; or,

2. If no time be limited, then upon the expiration of due notice given to either party by the other to terminate it at a specified time; or,

3. By a breach of its stipulations, expressed to be conditions thereof.

<sup>1</sup> *Halleck, Intern. Law and Laws of War*, p. 658. *Wildman, (Intern. Law*, v. 2, p. 27, citing *Grotius, de Jure Belli ac Pacis*, III., 21, XI.,) says, that the obligation of a truce ceases if violated by the other party, for the obligation is conditional.

When a penalty is annexed to a violation an option is given, and if the penalty is demanded and paid the truce continues. 2 *Wildman's Intern. Law*, 28.

### *Unauthorized breach.*

**781.** A truce or armistice is not terminated by acts

not authorized by the commander, unless they are ratified by a refusal of satisfaction or otherwise.

2 *Wildman's Intern. Law*, 28; *Bluntschli, Droit Intern. Codifié*, §§ 690, 696.

*Recommencing hostilities.*

**782.** At the expiration of a truce or armistice, hostilities may be commenced without any new declaration of war, or notice, unless otherwise agreed.

*Lawrence's Wheaton, Elem. of Intern. Law*, p. 687, § 23; *Dana's Wheaton*, § 404, citing *Liv. Hist.*, lib. IV., cap. 30; 1 *Kent's Commentaries*, p. 161, citing *Vattel, Droit des Gens*, bk. 3, c. 16, § 260; *Bluntschli, Droit Intern. Codifié*, §§ 694, 695.

*Flags of truce.*

**783.** The bearer of a flag of truce is to be respected and protected by each belligerent, so far as possible, in coming and going, without suspending hostilities, but can not insist on being admitted; and if admitted during an engagement, may be detained till the engagement is over.

*Lieber's Instructions*, ¶¶ 111-113.

*Effect of capitulation.*

**784.** After signing the capitulation of a fortified place, the capitulator must not injure the works or property which he is to deliver up, unless the right to do so is reserved in the capitulation.

*Lieber's Instructions*, ¶ 144.

## CHAPTER LXI.

## MEDICAL SERVICE.

- ARTICLE 785.** "Ambulances" and "hospitals" defined.  
786. Neutrality of ambulances and hospitals.  
787. Persons attached to ambulances and hospitals.  
788. Hospital supplies.  
789. Exemption of private property and persons.  
790. No distinction to be made in succor.  
791. Immediate exchange of sick and wounded.  
792. Prisoners incapacitated from future service.  
793. Other sick and wounded.  
794. Flag and badge.  
795. Hospital ships to be of white exterior with green ports.  
796. Effect of visitation of private ship used for sick and wounded.  
797. Belligerent's control of private ship used for sick and wounded.  
798. Voluntary societies for succor at sea.

*"Ambulances" and "hospitals" defined.*

**785.** The terms "ambulances" and "hospitals" as used in this Code, include all establishments, places, ships and vehicles, permanent or temporary, which are exclusively devoted to the reception, care or transportation of the sick or wounded, or of supplies or attendants therefor.

*Neutrality of ambulances and hospitals.*

**786.** Ambulances and hospitals are to be deemed neutral, and as such must be respected and protected by each belligerent, as long as they contain sick or wounded, and have only a sufficient guard to protect the inmates from disorderly violence.

Convention of Geneva, Art. 1.

*Persons attached to ambulances and hospitals.*

**787.** The persons attached to the ambulances and hospitals, mentioned in the last article, for medical service, may continue their functions after the enemy has taken possession of the place or ship where they are, until they withdraw to join the forces to which they belong. When they insist upon withdrawing, the commanding officer must fix the time for their departure, with the least delay of which military necessity admits.

While they remain with the enemy they are entitled to receive from him the support and treatment appropriate to their rank or service, according to the rate of either belligerent, whichever may be the lowest.<sup>1</sup>

Convention of Geneva, Art. 3, and additional Articles 1 and 2. The neutrality assured to these persons is defined by Article 749.

<sup>1</sup> *Etude sur la Convention, par Gustave Moynier, p. 172.*

*Hospital supplies.*

**788.** The supplies of ambulances are not subjects of capture; and the persons in the service thereof, on withdrawing after capture, as mentioned in article 787, may take away their private property.

The Convention of Geneva, Art. 4, leaves the supplies of hospitals, as distinguished from the ambulance service, subject to capture.

*Exemption of private property and persons.*

**789.** A house which receives and cares for sick or wounded must be respected and protected; and the householder shall be in due proportion exempted from the billeting of troops, and from forced contributions.

Convention of Geneva, Art. 5, and additional Article 4.

*No distinction to be made in succor.*

**790.** The sick and wounded prisoners of war of both belligerents must be received and cared for without distinction of nationality.

Convention of Geneva, Art 6, ¶ 1.

*Immediate exchange of sick and wounded.*

**791.** Immediately after a battle the chief commanding officers may, by mutual consent, each send his sick and wounded prisoners of war to the outposts of the other,<sup>1</sup> without further conditions of exchange.<sup>2</sup>

<sup>1</sup> Convention of Geneva, Art. 6, ¶ 2.

<sup>2</sup> This seems to be implied.

*Prisoners incapacitated from future service.*

**792.** Sick or wounded prisoners of war, who, after recovery, are found incapable of future military service, must be sent back to their own nation, as soon as practicable.

Convention of Geneva, Art. 6, ¶ 3.

*Other sick and wounded.*

**793.** By consent of both belligerents, sick or wounded prisoners of war taken by either, and not incapable of future service, except officers above the rank of colonel,<sup>1</sup> may be sent back to their nation as soon as practicable, on condition of not taking up arms again during the war, unless duly exchanged.

Convention of Geneva, Art. 6, ¶ 4, and additional Art. 5. The effect of the latter article, though in its form imperative, is merely permissive as above stated. See *Etude sur la Convention, par Moynier*, pp. 217-226.

<sup>1</sup> The rank should be made definite as here stated.

*Flag and badge.*

**794.** In order to secure the protection offered by this Chapter, a hospital flag, accompanied always by the national flag, must be displayed by the hospitals and ambulances, and a badge must be worn by the persons in the service.

The hospital flag and badge display a red cross on a white ground. They can be used only by permission of the military authority.

Convention of Geneva, Art. 7.

A yellow flag has been used in the United States navy to designate a boat bearing medical officers. *U. S. Navy Ordnance*, pt. 2, p. 26, § 83.

A red flag has been used to indicate the handling of powder. *Id.*, pt. 3, p. 52, § 157

*Hospital ships to be of white exterior with green ports.*

**795.** Hospital ships and boats must also be distinguished by a white exterior with green ports.

Convention of Geneva, additional Art. 12, ¶ 3.

*Effect of visitation of private ship, used for sick and wounded.*

**796.** The visitation of a private ship used for sick and wounded, notified upon its log, by a public armed ship of the enemy, renders it unlawful for the sick and wounded on board to take up arms again during the war, unless duly exchanged. And the visiting ship may put on board a sufficient force to secure the performance of this obligation.

Convention of Geneva, Art. 10, additional Art. 1. The two paragraphs which protect cargo on such vessels if not contraband, would be rendered superfluous by the Articles relating to private property. The last paragraph of the article seems superfluous. See *Etudes sur la Convention*, par Moynier, p. 263.

*Belligerent's control of private ship used for sick and wounded.*

**797.** A belligerent from whom protection or respect is claimed for a ship under the last article, may forbid its taking any direction, or maintaining any intercourse, which he may judge prejudicial to his operations.

Convention of Geneva, Art. 10, additional paragraph 3.

*Voluntary societies for succor at sea.*

**798.** Any nation may give to a commission or society, organized under its law for the succor of sick and wounded in war, written authority to employ ships and the necessary attendants and supplies for the succor of sick and wounded at sea, subject to the provi-

sions of this Chapter ; and they must be respected and protected accordingly.

Substituted for the more special provisions of the Convention of Geneva, additional Article 13.

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## CHAPTER LXII.

### RELIGIOUS SERVICE.

ARTICLE 799. Chaplains, &c., to be respected and protected.

*Chaplains, &c., to be respected and protected.*

**799.** Chaplains, ministers of the gospel, and priests of every religion, engaged in ministering, as such, to the forces of a belligerent, or to prisoners, or to any persons suffering in war, must be respected and protected by each belligerent, so long as they take no part in the hostilities.<sup>1</sup>

The provisions of articles 787 and 788 apply to such persons and to the books and other articles used in their religious service.

<sup>1</sup> Perhaps a badge should be required to be worn by them.



## CHAPTER LXIII.

## PRISONERS.

- ARTICLE 800. The right to take prisoners.  
801. What persons may be taken prisoners.  
802. Persons not entitled to be treated as prisoners of war.  
803. Messengers.  
804. Personal property of prisoners of war.  
805. Sums of money.  
806. Surrender of side-arms.  
807. Provision for maintenance of prisoners.  
808. Restraint.  
809. Rights of prisoner.  
810. When prisoners of war may be punished.  
811. Treason and other offenses committed in waging civil war.  
812. Information.  
813. Deceit by prisoner.  
814. Compulsory labor.  
815. Subject to retaliatory measures.  
816. "Parole" defined.  
817. Parole.  
818. Forbidding parole.  
819. Extortion of parole by ill usage.  
820. Paroles to be reduced to writing.  
821. Obligation of a parole.  
822. Violation of parole.  
823. Escapes.  
824. "Hostage" defined.  
825. Treatment of hostages.  
826. Death of hostage.  
827. Cartels.  
828. Right of belligerent to retain prisoners.  
829. Manner of exchanging prisoners.  
830. Ransom.  
831. Cartel for exchange.  
832. Breach of cartel.  
833. Cartel ships.  
834. Protection of cartel ships.

*The right to take prisoners.*

**800.** Any belligerent has a right to take prisoners.

*What persons may be taken prisoners.*

**801.** The following persons may be taken prisoners, and no others :

1. Active enemies, as defined by article 746 ;
2. Those who are connected with the operations of the military forces, whether with or without the authority of the nation ;
3. The sovereign or chief executive officer of the enemy, or of his allies ;
4. Officers of the civil government of the enemy whose functions directly subserve a military purpose ;
5. Persons who are engaged in the country of the enemy, or within the military lines, in proclaiming opinions or disseminating information prejudicial to the success of the belligerent ;
6. Persons charged with offenses against the provisions of this Book ; or with a violation of the military law of the captor, when amenable thereto ;<sup>1</sup> and,
7. Persons of whatever character found on the field of battle.

*Fioré Nouveau Droit Intern.*, v. 2, p. 296.

*Bluntschli*, (*Droit Intern. Codifié*, § 594,) says, that all enemies may be taken prisoners ; the inhabitants of the country may be, exceptionally, if the safety of the belligerent army requires it. He enumerates as proper subjects of capture, journalists and others who advance hostile opinions, the sovereign and diplomats of the enemy, and of his allies.

*Halleck*, (*Intern. Law and Laws of War*, p. 428, § 4,) says, non-combatants forfeit their exemption by inciting others to hostilities. *Lieber's Instructions*, (§§ 49, 50,) include among persons liable to be treated as prisoners of war, "all men who belong to the rising *en masse* of the hostile country ; all those who are attached to the army for its efficiency, and promote directly the objects of the war ; . . . citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, and contractors ;" . . . and also, if captured on belligerent ground, and if unprovided with a safe conduct from their captor's government, "the monarch and members of the hostile reigning family, male and female ; the chief, and chief officers, of government ; and all

persons who are of particular and singular use and benefit to the hostile army and its government."

The term "active enemies," used in the text, and defined by Article 746, will include all of these whose possession is important to the victor.

Surgeons, nurses, and chaplains are usually classed among non-combatants, unless special reasons require an opposite treatment of them. *Woolsey's Intern. Law*, § 128; *Lieber's Instructions*, ¶ 53. If they are held by the commander, or at their own desire, they are to be treated as prisoners of war.

<sup>1</sup> This will include *deserters*. See *Vattel, Droit des Gens*, liv. 3, ch. 8, § 144; *Halleck, Intern. Law and Laws of War*, p. 443, § 24.

Fugitives from allegiance are not provided for, as it would hardly be expedient to suspend the right of expatriation during war.

*Persons not entitled to be treated as prisoners of war.*

**802.** All prisoners taken in war are to be deemed and treated as prisoners of war, except the following:

1. Those who, not being impressed with the military character, are unlawfully waging hostilities;
2. Those who are unlawfully giving aid and comfort to the enemy;
3. Spies;
4. Pirates; and,
5. Those who are charged with a violation of provisions of this Book, or of the military law of the captor.

### *Messengers.*

**803.** Messengers, employed by the enemy between different positions or parts of his own forces, are entitled, whenever captured, to be treated as prisoners of war, unless employing treachery or disguise.

*Bluntschli, Droit Intern. Codifié*, § 639.

*Lieber, (Instructions, ¶¶ 99, 100,)* says, that "a messenger carrying written despatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him. A messenger or agent who attempts to steal

through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

This rule, however, seems too harsh.

*Personal property of prisoners of war.*

**804.** Subject to the next two articles, money and other valuables on the person of a prisoner of war, or in his possession, as well as his clothing, remain his private property, and their appropriation by the captor is unlawful.

*Lieber's Instructions, ¶ 72.*

*Sums of money.*

**805.** If the captured money of a prisoner of war be more than is necessary for his support, the excess may be appropriated by the captor, to be disposed of as the national authority directs.

*Lieber's Instructions, ¶ 72.*

*Surrender of side-arms.*

**806.** Officers when taken prisoners must surrender their side-arms, unless the captor waives the surrender. Leave to retain side-arms does not allow the prisoner to wear them.

*Lieber's Instructions, ¶ 73.*

*Provision for maintenance of prisoners.*

**807.** Prisoners of war must be sufficiently fed, clothed, sheltered and medically provided for by the captor, and treated in all respects with humanity.<sup>1</sup>

The enemy may be required to make good the expense,<sup>2</sup> unless the detention be caused by the captor's refusal to exchange or ransom.<sup>3</sup>

<sup>1</sup> *Lieber's Instructions, ¶¶ 76, 79.* As to their treatment, see also *Woolsey's International Law, § 328.*

<sup>2</sup> *Vattel, Droit des Gens, liv. 3, ch. 8, § 154; Halleck, Intern. Law & Laws of War, p. 434, §§ 14, 17.*

<sup>3</sup> *Halleck, Intern. Law & Laws of War, p. 436, § 16.*

*Restraint.*

**808.** Prisoners of war may be subjected to the restraint necessary<sup>1</sup> for their safe custody. The infliction upon them of any suffering or indignity is unlawful.

<sup>2</sup> *Wildman's Intern. Law*, p. 26.

<sup>1</sup> Prisoners of war may be confined or fettered, when necessary for their safe keeping. *Halleck, Intern. Law & Laws of War*, p. 430, § 7.

*Rights of prisoners.*

**809.** A prisoner of war does not lose any of his rights, except that of liberty. His captivity only suspends the exercise of those rights with which it is inconsistent.

*Bluntschli, Droit Intern. Codifié*, § 738.

*When prisoners of war may be punished.*

**810.** A prisoner of war can not be punished for being an enemy, nor for lawful hostilities committed by him as such.<sup>1</sup>

He may be punished for crimes<sup>2</sup> committed against the captor or the captor's people, for which he has not been punished by his own nation.

*Lieber's Instructions*, ¶¶ 56, 59.

<sup>1</sup> Opinions of Sir John Dodson, Sir John Campbell and Sir R. M. Rolfe, in *Cases & Opinions in Constitutional Law*, by Forsyth, p. 199.

<sup>2</sup> These crimes are not only such as are defined by this Code, but include others.

*Treason and other offenses committed in waging civil war.*

**811.** The provisions of this Code as to prisoners of war do not prevent a nation from punishing its own members or domiciled residents, for any violation of its laws involved in their taking part in a civil war.

*Information.*

**812.** Prisoners can not be required to give information concerning their own forces; nor if required to do so, can they be punished for giving false information.

*Lieber's Instructions*, ¶ 80. Perhaps an exception should be made in respect to services as guides.

*Deceit by prisoner.*

**813.** If a prisoner assume a false rank or condition to affect his treatment in respect of confinement or exchange, his release may be refused, and he may be punished on recapture after release obtained by such means.

*Lieber's Instructions*, ¶ 107.

*Compulsory labor.*

**814.** Prisoners of war can not be required to work for the captor, except for their own support, in case their own nation fails to provide adequately for them, and then only according to their rank and station;<sup>1</sup> and not in any service which directly subserves a military purpose.<sup>2</sup>

<sup>1</sup> *Lieber's Instructions*, ¶ 76. Halleck, (*Intern. Law & Laws of War*, p. 436, § 15,) says, they are not required to do so beyond the police duty of camp and garrison, and also where the enemy refuses to provide for them, and in extreme cases.

<sup>2</sup> This qualification is obviously proper.

*Subject to retaliatory measures.*

**815.** All prisoners of war are liable to the infliction of retaliatory measures.

*Lieber's Instructions*, ¶ 59.

See Article 758.

*“Parole” defined.*

**816.** A parole is a pledge of individual good faith and honor to do, or to omit doing, certain acts, after he who gives his parole shall have been dismissed wholly or partially from the power of the captor.

*Lieber's Instructions*, ¶ 120.

*Parole.*

**817.** Engagements made by prisoners of war that for a period not exceeding the duration of the war

they will not escape, nor bear arms against the captor, are valid ; unless forbidden as provided in the next article, and the nation to which the service of such prisoners is due is bound to enforce such engagements.

Other engagements by prisoners of war inconsistent with their allegiance, are void.

*Halleck, Intern. Law & Laws of War*, p. 434, § 12 ; *General Orders of U. S. War Department*, 1863, vol. 2, p. 52, No. 49, § 12.

Paroles can only refer to the existing enemy and to his existing allies, and the existing war. *Gen. Ord. of U. S. War Dep.*, 1863, vol. 2, p. 51, No. 49, § 9.

A military parol not to serve until exchanged must not be confounded with a parole of honor, to do or not to do a particular thing not inconsistent with the duty of a soldier ; such as a parole of honor not to attempt to escape, given by a prisoner in actual custody, in order to obtain exemption from close guard or confinement. Such pledges, though binding, should be seldom given, for it is a prisoner's duty to escape if he can. *Id.*, 1863, vol. 2, p. 237, No. 207, § 3.

It is the duty of the captor to guard his prisoners, and if, through necessity or choice, he fail to do so, it is the duty of the prisoner to return to the service of his government. He can not avoid this duty by giving an unauthorized parole. *Id.*, 1863, vol. 2, p. 237, No. 207, § 2.

An officer who gives a parole for himself or his command on the battle-field, is deemed by the common law and usages of war, to be a deserter. *Id.*, 1863, vol. 2, p. 51, No. 49, § 4.

*Lieber, (Instructions, ¶¶ 126-128,)* says, that commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach ; that no non-commissioned officer or private can give his parole except through an officer. And individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

No paroling on the battle-field, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or is of any value.

### *Forbidding parole.*

**818.** A nation which provides adequately for the

support of prisoners taken by the enemy, may forbid their accepting a release on parole.

See *Halleck, Intern. Law & Laws of War*, p. 438, § 18, who says, a nation can not forbid a release on parole, unless at the same time it provides means of support during imprisonment.

*Extortion of parole by ill usage.*

**819.** A pledge or parole extorted from a prisoner by ill usage is not binding.

*General Orders of U. S. War Dep.*, 1863, vol. 2, p. 237, No. 207, § 3.

*Paroles to be reduced to writing.*

**820.** When a parole is given and received, there must be an exchange of two documents, in which the name and rank of the person paroled are accurately stated.

And accurate lists of all paroled persons must be kept by the belligerents.

*Lieber's Instructions*, ¶¶ 124, 125.

*Obligation of a parole.*

**821.** An obligation by parole not to serve again during the war, forbids active service in the field or at sea, against the paroling belligerent or his allies, but does not forbid active service against other belligerents, nor interior service, such as recruiting or drilling recruits, fortifying places not besieged, or quelling civil commotions, nor civil, diplomatic, or other non-combatant service.

*Lieber's Instructions*, ¶ 130.

*Violation of parole.*

**822.** A prisoner who violates a lawful parole may be punished with death if recaptured.

*Martens, Droit des Gens*, tome II., § 275 ; *Lieber's Instructions*, ¶ 124.

The modern practice usually is to abstain from the infliction of death, except in an aggravated case, and to substitute close confinement with severities and privations not cruel in their nature or degree.



*Escapes.*

**823.** A conspiracy among prisoners for a common escape is unlawful, and may be punished with death.

An individual escape or attempt at escape by a prisoner of war, without conspiracy or violation of parole, is lawful; but a prisoner may lawfully be killed if discovered in flight.<sup>1</sup>

*Lieber's Instructions*, ¶ 77.

<sup>1</sup> On being recaptured the escaped prisoner can not be punished for such escape. *Ib.*, ¶ 78.

*"Hostage" defined.*

**824.** A hostage is a person accepted as a pledge for the fulfillment of an agreement between belligerents.

*Lieber's Instructions*, ¶ 54. Hostages are now rarely given.

*Treatment of hostages.*

**825.** If the giver of a hostage fail to perform his obligation, the hostage may be retained; but neither death, nor any personal injury beyond detention by such means only as are necessary for enforcing the pledge, can be inflicted on him.<sup>1</sup>

In other respects, hostages are entitled to the immunities of prisoners of war.<sup>2</sup>

<sup>1</sup> 2 *Phillimore's International Law*, p. 68.

It has been said that a hostage is to be treated as a prisoner of war, but by this no more is meant than that he is not to be treated as a criminal. He is not subject to the peculiar liabilities nor has he the peculiar advantages of a prisoner of war. It is clear, says *Phillimore*, (vol. 2, p. 68,) that any proceeding of rigor against a hostage, even if he be forcibly seized in time of war, beyond what may be necessary for the security of his person, is illegal. Nor is he on the other hand entitled to exchange like a prisoner.

<sup>2</sup> *Bluntschli, Droit Intern. Codifié*, § 600.

*Death of hostage.*

**826.** If a hostage die, the giver is not bound, except in case of an express stipulation, to replace him.

<sup>2</sup> *Phillimore's Intern. Law*, p. 68.

*Cartels.*

**827.** It is the duty of belligerents to exchange prisoners of war, or allow them to be ransomed on reasonable terms.

Spies, war-traitors and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

*Right of belligerent to retain prisoners.*

**828.** A belligerent has the right to retain prisoners of war until the end of the war, if exchange can not be agreed on.

*Vattel, Droit des Gens*, liv. 3, ch. 8, § 153 ; *Halleck, Intern. Law and Laws of War*, p. 431, § 9.

*Manner of exchanging prisoners.*

**829.** Unless otherwise regulated by cartel or special agreement, exchanges of prisoners of war take place, number for number, rank for rank, wounded for wounded, with added condition for added condition, such, for instance, as not to serve for a certain period.

*Lieber's Instructions*, ¶ 105.

*Ransom.*

**830.** Ransom for prisoners can be required only for those remaining upon one side after a general exchange has taken place,<sup>1</sup> and upon the authority of the nation by whose forces the capture was made.

An officer can not take ransom. *Lieber's Instructions*, ¶ 74.

*Fioré, (Nouveau Droit Intern., vol. 2, p. 295)* condemns the alleged right to claim ransom.

<sup>1</sup> See *Lieber's Instructions*, ¶ 108.

*Cartel for exchange.*

**831.** A cartel, for the exchange of prisoners, may be agreed on by the nation, or by the commander in the field or fleet.

See *Lieber's Instructions*, ¶ 106.

*Breach of cartel.*

**832.** A cartel may be terminated by either party, whenever violated by the other.

*Lieber's Instructions*, ¶ 109.

*Cartel ships.*

**833.** A cartel ship is one actually engaged by a belligerent for service in the transportation of prisoners taken in war, agreeably to a cartel for exchange.

A cartel ship should carry a pass from the nation employing it, and a flag of truce, with the flags of each belligerent displayed together.

See *Lushington's Naval Prize Law*, §§ 276, 277.

*Protection of cartel ships.*

**834.** Cartel ships, while actually and exclusively engaged in service as such, and in going to and returning from such service, if they engage in no other traffic or intercourse whatever, whether otherwise lawful or unlawful, and are guarded only by a sufficient force to suppress disorderly violence, are free from capture, and are to be respected and protected by each belligerent.

*Kent*, (1 *Commentaries*, p. 66,) says, that it is indispensable that a cartel for the exchange of prisoners be conducted with the most exact and exclusive attention to the original purpose, as being the condition upon which the intercourse by cartel ships can be tolerated. All trade, therefore, by means of such ships, is unlawful, without the express consent of both the governments concerned.

See *Lushington's Naval Prize Law*, § 275, where the rule is stated as excluding the carrying of cargo and engaging in unlawful intercourse.

For the existing rules as to cartel ships, see *Wildman, Intern. Law*, v. 2, p. 30. Compare Article 786.

## CHAPTER LXIV.

## HOSTILITIES AGAINST PROPERTY.

- ARTICLE 835. What property may be seized.  
 836. What the belligerent may appropriate, and for what end.  
 837. Destroying means of communication.  
 838. Destroying facilities of navigation.  
 839. Ravaging or laying waste enemy's country.  
 840. Property exempt from acts of hostilities.  
 841. Property exempt not to be sold or carried away.  
 842. Use of and title to public immovables.  
 843. Title to movables.  
 844. Revenues held in trust for governing the country.  
 845. Public ships surprised by war.  
 846. Private property to be respected.  
 847. Rescue.  
 848. Effect of recapture of property of a neutral.  
 849. Effect of recapture of property of a belligerent.  
 850. Military burdens of passive enemies.  
 851. Compensation for property taken for military uses.

The most important change of existing rules which is proposed by the provisions of this Chapter, is the exemption of private property from capture, at sea as well as on land, except in the cases of its being contraband, or employed in illegal traffic, or actually used to promote the purposes of the war; and except, also, in cases of military necessity, when compensation is made.

The rule that private property on land ought to be respected as far as possible may now be regarded as fully recognized; *Bluntschli, Droit Intern. Codifié*, § 651; *Lieber's Instructions*, ¶ 38; subject, however, to the ill-defined exceptions of military necessity. See notes to Article 846.

It may be conceded that the earlier authorities sustained the right of taking booty on land; and that the modern rule had its origin as asserted by *Hautefeuille, (Droits et Devoirs des Nations Neutres, tit. III., section III., § 1.)* in the impolicy of exasperating the inhabitants of a territory

by depriving them of their goods ; but whatever its original reason, it is sufficiently settled as a rule of civilized warfare to need no further discussion here. The question now is whether the same rule ought not to be extended to property at sea.

The apothegm of Sir *John Nicholl*, (8 *Term Rep.*, 548,) that "there could be no such thing as a war for arms and a peace for commerce;" and that of Sir *Travers Twiss*, (*Law of Nations*, pt. II., p. 52,) that "because private war is inconsistent with public peace, it follows that public war is equally inconsistent with private peace," are little more than a play upon words, or at best, maxims which belong to the times when every individual of one belligerent nation was deemed an enemy of every individual of the other ; when *Vattel* could inquire whether women and children are numbered among enemies, and answer in the affirmative ; and when even *Kent* could declare, that all meeting of citizens of adverse belligerents, except in deadly combat, was unlawful.

The rule now generally acknowledged by civilized nations is that the belligerent nations, not their non-combatant members, are enemies, (see Articles 705 and 744 ; ) and the history of recent great wars has demonstrated that there may be such a thing as a peace for commerce during a war of arms. Private war having become illegal, private peace should be secured so far as possible. There is no reason why public war should disturb private peace, merely for the sake of booty.

The chief arguments on this question, which still deserve consideration, are perhaps more completely indicated by *Ortolan*, (*Diplomatie de la Mer*, liv. III., ch. 2,) than by any other author.

After alluding to the reasons of humanity, and of commercial interest, on which the protection of private property at sea has been urged, and raising the inadequate objection that some other severities of war are still more objectionable in these respects, and replying to the argument that the rule of justice must be uniform, by saying that the land and the sea are so different that the one can not afford a rule for the other, he defends the right of capture at sea, upon the following grounds :

1. The object of war is to compel a peace by injuring the enemy ; and on land the military power may impose requisitions and levies on the inhabitants ; which, in fact, are only convenient modes of seizing private property, and can not be substituted at sea for individual capture :

2. If war at sea were to be restricted to the naval forces, it would be impossible to injure the enemy there, he keeping his ships of war in port ; and meanwhile he might carry on intercourse by private ships with impunity ;

3. The capture of a ship and cargo is not like the confiscation of a warehouse of goods ; for the ship and seamen are potentially an auxiliary of the naval forces of the nation, and constitute means of extending its power beyond its proper territory ;

4. The doctrine of the freedom of the seas favors the right of capture ; for, since a belligerent can not take possession of the sea and hold it as a territory, he can only take the ships he finds there ; and as by occupy-

ing territory he may interfere with the territorial power of his enemy, so at sea by capturing ships he may interpose against his enemy's right of passage on the seas;

5. The land rule does not leave non-combatants free to carry on an unrestricted commerce on the territory within military occupation; but it forbids trade, it makes personal property inviolable only for a sufficient time to allow its sale or removal, and the continued protection of the title to real property is a principle inapplicable to ships which are personal property;

6. Without capture of private property, war at sea would be imperfect and, in so far, interminable.

And, finally, he concludes that it is a question of conflict between national and private rights; and that private rights being the less important interest, must yield so far as incompatible with the greater interest.

The solution which he suggests is the maintenance of the right of capture, both of ship and cargo; together with the partial protection of private right, by a restoration of the value of the goods, in specified cases, to be made either immediately, or at the termination of the war.

The one exception which he recognizes is that of the vessels, &c., of coast fisheries, when they serve chiefly as the means of subsistence of offensive inhabitants, and have no public and general importance.

*Dana*, (in a note to *Wheaton*.) earnestly advocates the practice of warring on commerce, declaring that in his opinion it is the most humane, and often the most efficient part of war, and the least objectionable part. "It takes no lives, sheds no blood, imperils no households: has its field on the ocean, which is a common highway, and deals only with the persons and property voluntarily embarked in the chances of war, for the purposes of gain, and with the protection of insurance. War is not a game of strength between armies or fleets, nor a competition to kill the most men and sink the most vessels; but a grand valiant appeal to force, to secure an object deemed essential, when every other appeal has failed." *Dana's Wheaton, Elements of Intern. Law*, p. 876.

In reply to the observations that capture at sea corresponds with the right of requisition on land, and that the enemy may unexpectedly turn private ships and seamen into naval forces, it may be said that the right of requisition is restricted, and requires compensation; see Article 851.) and that the capacity of a ship to serve in the war could at most be a ground for its detention, not for confiscation either of the ship or its contents.

The freedom of the seas, and the possibility of a belligerent avoiding maritime war by ceasing to send out ships of war, and the suggestion that maritime warfare will become inconclusive without the right of private capture, may well be urged as arguments in favor of the reform against which they are cited. The sea is the highway of nations, and may well be dedicated by common consent, to peaceful uses. The peculiar sufferings and abuses incidental to hostilities at sea, and the fact

that the result of a conflict there is so far dependent on fortuitous circumstances, such as the number and strength of vessels meeting, the condition of the weather, &c.,—as to have in modern times but slight connection with the ultimate fortunes of the war, should incline us to the conclusion, that this concession to peace would not involve a sacrifice of essential belligerent rights.

The objection that commerce on land is interrupted by war, is entitled to the weight of analogy under existing rules; but if the succeeding Articles should be received with favor, commerce on land, (in goods not contraband,) will be interrupted only between places in the actual military possession of the belligerents, or when it directly subserves the purposes of the war. This salutary modification has already been made in several wars, which are noticed below.

So far as the consistency of a theory is entitled to weight on such a question as this, it seems sufficient to say with *Fioré*, (*Nouveau Droit International*, v. 2, pt. II., pp. 322, 324,) and *Pradier-Fodéré*, (note to *Vattel, Droit des Gens*, Ed. of 1863, liv. 3, ch. 5, § 72, 1,) that war is now a relation between nation and nation, and that therefore private property, at sea as well as on land, should be respected as far as possible. The right to injure the enemy is a right to injure the State, and not its non-combatant members. On land, some injury of private property is necessarily incident to the pursuit of the enemy; and, so far, such injury is allowable; at sea, the capture of private ships is not incidental to the right to pursue the enemy, and there should not be allowable.

For a satisfactory solution of the question we must, however, look beyond theoretic considerations to the interests which are practically involved; and in this respect the question is this: Can private property be spared, without seriously impairing the efficiency of military measures, as a last resort for the settlement of disputes between nations bound so closely, in pacific relations, as those which may unite in this Code?

And here it is to be observed, that the interests of peace which are affected are much broader and more sensitive than those of war. The advantage of the existing rule is the pressure it puts upon the enemy to submit; the disadvantage includes, besides the actual loss of property, and derangement of commerce during war, the immense losses sustained on account of the apprehensions of war during time of peace. The measure of the advantage, on the one hand, is not the actual loss inflicted during the war, but only the pressure indirectly brought to bear on the hostile government through the sufferings of its citizens by those losses, while the measure of the disadvantage exceeds the actual losses, and includes those derangements of commerce which are so quickly felt when an apprehension of war arises, and from which recovery is so slow after peace has been established.

In view of these considerations it is submitted that the complete protection of private property, with proper qualifications in respect to contraband, prohibited intercourse, &c., is demanded by the interests of na-

tions and individuals, and that it is not incompatible with the maintenance of efficient and adequate military power as a final arbiter in international controversies.

This principle was recognized and adopted in the treaty between the United States and Prussia, (1785,) and has always been advocated by the government of the United States; and was approved for general adoption by Prussia, in 1824, (*Katchenovsky's Prize Law*, by Pratt, p. 164,) and is said to have been established by treaties between the Southern American Republics, in 1851 and 1856. *Id.*, p. 164, note (z). In the war of England and France with China, the right of maritime capture was totally suspended. *Id.*, p. 167; and see note to Article 846 of this Code.

In the Franco-Prussian war, (July, 1870,) the North German government declared private property on the high seas to be exempt from seizure by them, without regard to reciprocity. The French government refused to relinquish the right of capture. In consequence of the capture of German merchant ships by France, the North German government revoked the exemption they had declared, giving, however, four weeks' notice of the new measure. See *Foreign Relations of the United States*, 1870, p. 217; *Id.*, 1871, p. 403.

At the commencement of the war between Austria and Italy, in 1866, the belligerents agreed that merchant vessels on both sides should be free from capture; "and the results of this agreement," says *Lushington*, (*Naval Prize Law*, Intro., p. viii., note,) "coupled with the rule (prescribed by the treaty of Paris,) 'free ships make free goods,' was that the private property of the enemy at sea was as completely exempt from hostile capture as private property on land."

By a decree of March 29, 1865, the Emperor of the French made restitution to the parties in interest, of all Mexican private ships taken during the war between France and Mexico, and which had at that date been condemned by order of a prize court, and also of the proceeds of those which had been sold but not finally adjudicated upon. 9 *De Clercq*, 228. Somewhat similar modifications of the general rule were made in 1859, in the war between Italy, France, and Austria. 6 *De Clercq*, 665.

European governments have frequently, at the termination of a war, restored to one another the ships taken from their subjects, or have established mixed commissions for the purpose of ascertaining the damages incurred by the merchants, and the amount of compensation they were entitled to. As an example, may be cited the convention between France and Spain, in the year 1823. *Martens*, N. R., VI. 386. England also, at the conclusion of the war with Holland, (1832,) restored to her all the Dutch vessels that had been taken. *Martens*, N. R., XIII. 97, 98. As to the other exceptions, see *Martens*, N. R., XVI. 2, 611; and *Wurm Zeitschrift für der gesammte Staatswissenschaft*, (1851,) 322, 323.\*

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\* During the war between Brazil and Paraguay. (1870,) certain non-combatant Paraguayans (women) deposited their valuables at the United States Legation in Asuncion. The Paraguayan forces subsequently occu-



Thus far has been had in view the private property of members of the hostile nations. In respect to the property of neutrals, the principles of the Treaty of Paris of 1856 are embodied in the provisions of this Code.\*

In the fourteenth century, the rule was to confiscate enemy's but not neutral property, and where neutral goods were found on an enemy's ship, or a neutral ship was taken bearing enemy's goods, the neutral goods or ship were restored, and only the enemy's ship or goods were confiscated. *Twiss, Law of Nations*, part II., p. 147, § 77.

In the sixteenth century, the doctrine of hostile taint was adopted by France and Spain, and the neutral ship carrying enemy's goods, and neutral goods borne by an enemy's ship, were by them declared tainted with belligerency, and liable to confiscation.

In the latter part of the eighteenth century, this doctrine was abandoned by France, and that which exempts neutral ships and goods, and even enemy's goods (except contraband), when found on neutral ships, was, with some qualifications and fluctuation, adopted.

The rule established by the governments maintaining the armed neutrality of 1780, permitted the seizure of neutral ships only where the duties of neutrality had been unquestionably violated. And in the same year the French government forbade the molestation of neutrals, even though apparently destined to enemy's ports, and directed that in no case should neutral vessels be captured, unless they had cargoes contraband of war, or were engaged in the transport of English troops, or harbored Englishmen under a neutral flag. *Katchenovskiy's Prize Law*, by Pratt, p. 63, and note (p.)

In the seventeenth century, Holland made several treaties, among

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pied the town as a stronghold, and expelled the inhabitants, including the American representative. The Paraguayans afterwards abandoned it, and the Brazilian forces entered and took possession; and the property contained in the building which had been occupied by the American Legation, fell into their hands. The government of the United States demanded of the Brazilian government the restoration of the property of the American representative and of the American citizens; and suggested also that the property of the Paraguayan women should be treated by analogy to enemy's property found on a neutral vessel, and also restored. And the Brazilian government, without expressing any opinion on this analogy, directed all the property which fell into their hands in the Legation, without distinction of ownership, to be restored to the representative of the United States. *Foreign Relations of the United States*, 1871, pp. 49, 50.

\* Those rules are that,

"A neutral flag covers enemy's goods, with the exception of contraband of war."

"Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag."

They are not stated in this form, because other exceptions than contraband need to be expressly recognized; and the Article protecting private property of members of the hostile nation supersedes the necessity of a distinct provision as to neutral property.

them one with France, recognizing more or less fully the doctrine that the national character of the ship should determine the fate of the goods.

These are the principal conflicting rules recognized on this point down to 1856, when the Treaty of Paris adopted the liberal rule that a free ship makes free goods, but an enemy's ship does not forfeit neutral goods.

This rule has now been so generally adopted, that it needs no further discussion here.\*

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\* The original parties to the Declaration of Paris of 1856, were Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey. The following powers have since given their adhesion to all the Articles. (*Twiss, Law of Nations*, Part II., p. 167, note 55.)

Baden,	Mecklenburg-Strelitz,
Bavaria,	Mecklenburg-Schwerin,
Belgium,	Nassau,
Bremen,	Oldenburg,
Brazil,	Parma,
Duchy of Brunswick,	Holland,
Chili,	Peru,
The Argentine Confederation,	Portugal,
The Germanic Confederation,	Saxony,
Denmark	Saxe-Altenburg,
The Two Sicilies,	Saxe-Coburg-Gotha,
The Republic of the Equator,	Saxe-Meiningen,
The Roman States,	Switzerland,
Greece,	Tuscany,
Guatemala,	Wurtemberg,
Hayti,	Anhalt-Dessau,
Hamburg,	Modena,
Hanover,	New Granada,
The Two Hesses,	Uruguay.
Lubeck,	

In the war of France and Great Britain against China, the principles of the Declaration of Paris, of 1856, were in substance adopted by both France and Great Britain, as a rule of action towards all nations, even those who had never acceded to that declaration. 8 *De Clercq*, 35.

That free ships make free goods; that is to say, that the goods belonging to subjects or citizens of a power or state at war, are free from capture or confiscation when found on board neutral vessels, with the exception of articles contraband of war, is recognized by the treaty between the United States and

Dominican Republic,	{ Feb. 8, 1867, Art. XV., 15 <i>U. S. Stat. at L.</i> , (Tr.), 167.
Bolivia,	May 13, 1858, " XVI., 12 <i>Id.</i> , 1003.
Venezuela,	Aug. 27, 1860, " XIV., 12 <i>Id.</i> , 1143.

That the property of neutrals on board of an enemy's vessel is not subject to confiscation, unless the same be contraband of war, is recognized by the treaty between the United States and

Dominican Republic,	{ Feb. 8, 1867, Art. XV., 15 <i>U. S. Stat. at L.</i> , (Tr.), 167.
Bolivia,	May 13, 1858, " XVI., 12 <i>Id.</i> , 1003.

In many of their treaties the United States of America have inserted the following clause:

*What property may be seized.*

**835.** Subject to the provisions of this Book, a belligerent, for the purpose of compelling the submission of the hostile nation, may seize and hold :<sup>1</sup>

1. The territory of the hostile nation ;<sup>2</sup>

2. Its public armed ships, except in the cases provided for by article 845 ;<sup>3</sup>

3. Other ships, public or private, bearing its national character, in the cases expressly provided for in this Book,<sup>4</sup> and no others ;

4. Other public property of the hostile nation, except such as may be within the territory of the belligerent by its own wrongful act,<sup>5</sup> and except such as is exempted from the jurisdiction of either nation by the provisions of Title III. of this Code, entitled INTERCOURSE OF NATIONS,<sup>6</sup> and of Chapter LXI., entitled MEDICAL SERVICE ; and of Chapter LXII., concerning RELIGIOUS SERVICE ;

5. All contraband of war, and all ships and goods involved in contraband traffic, in the cases and to the extent defined by Chapter LXV., entitled CONTRABAND OF WAR ; and,

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"Stipulations, declaring that the flag shall cover the property, shall be understood as applying to those powers only who recognize this principle ; but if either of the two contracting parties shall be at war with a third, and the other neutral, *the flag of the neutral shall cover the property of enemies whose governments acknowledge this principle, and not of others.*" *Katchenovsky's Prize Law*, by Pratt, p. 117, note (f.)

By the treaty between France and Peru, March 9, 1861, Art. XX., § 2, (8 *De Clercq*, 200,) property of members of either nation which remains neutral when the other is at war, are free from confiscation and detention even when on board an enemy's ship, unless contraband, or belonging to persons actually in the enemy's service, or destined to enter it.

For discussions of belligerent rights, the capture of private property at sea, &c., see *Transactions of the National Association for Promotion of Social Science*, 1860, pp. 163, 279 ; *Id.*, 1861, pp. 126, 748, 794 ; *Id.*, 1862, pp. 89, 896, 899 ; *Id.*, 1863, pp. 851, 878, 884 ; *Id.*, 1864, pp. 596, 656 ; *Id.*, 1868, pp. 167, 187 ; Vincens, *Exposition raisonnée de la Législation Commerciale*, (Paris, 1821,) liv. XII., ch. 17, 18 ; Massé, *Le Droit Commerciale*, (Paris, 1844,) I., pp. 153-4, 162-3 ; Kalténborn, *Die Kaperei im Seekriege*, s. 193-202, 216-228 ; Hautefeuille, *Droits et Devoirs*, I., 340-44 ; Martens, *Essai sur les Armateurs*, s. 45, who considers maritime capture contrary to the spirit of the present European private law. Heffter, (*Volkerrecht*, s. 130, 132, 139, 140, 175, 192,) takes an extended view of the subject, and seems to prove that by international law, war, at the present time, gives only actual possession, but not the legal property.

6. All personal property engaged in hostilities, or in intercourse which under the provisions of this Book is illegal.<sup>7</sup>

<sup>1</sup> Article 971 forbids the commission of any hostilities in the territory of a neutral nation.

<sup>2</sup> This includes the exercise of sovereignty over it. *Twiss, Law of Nations*, pt. II., 122, § 64.

To compel submission, a belligerent may take possession to an extent far beyond what would be a just indemnification, with the design of restoring the surplus by a treaty of peace. *Id.*, pt. II., 122, § 64. The question of *title* by capture is a distinct one; see Articles 842, 843, and 896.

<sup>3</sup> These are cases of ships within the territorial waters at the breaking out of the war, &c.

<sup>4</sup> These cases are resisting visitation and search, Article 871; hospital ships, Articles 796 and 797; and contraband, Article 854.

<sup>5</sup> *Wildman's Intern. Law*, vol. 2, p. 11, citing "Answer to Pruss. Mem.," 1 *Coll. Jur.*, 157.

<sup>6</sup> By the provisions here referred to, contained in Articles 139, 143, 183, and 184, the dwellings, archives, &c., of diplomatic and consular officers are exempt from the jurisdiction of the nation in which they are situated, with this qualification, that, by Article 109 the exemptions may be withdrawn in the case of an emergency affecting the existence of the nation. The exemption should continue through all ordinary vicissitudes of war. The right to send these officers and their movables out of the country in case of war, is reserved by Article 911.

<sup>7</sup> As to illegal hostilities, see Articles 741 and 742; and as to illegal intercourse, see Articles 920 and 921.

*What the belligerent may appropriate, and for what end.*

836. Subject to the provisions of this Book,<sup>1</sup> all public property, which, according to the last article, can be seized, may be used, absolutely appropriated, or destroyed by the belligerent, so far as may be necessary for the following purposes:

1. Overcoming the military power of the hostile nation;<sup>2</sup>

2. Retaking property, the withholding of which was the cause of the war;

3. Satisfaction for any other injury which was the cause of the war;

4. Reasonable security against future injuries;

5. Reimbursement of expenses incurred in pursuit of satisfaction, including the charges of the war, and the reparation of damages ; and,

6. Infliction of a loss, appropriate as a punishment for resorting to arms without a plausible pretext,<sup>1</sup> or for a breach of the provisions of this Book, to the injury of the belligerent.

<sup>1</sup> See the next Article, and Articles 893-896, which require judicial condemnation of contraband and of public property taken at sea not on armed ships.

A seizure of property for the purpose of applying it to military uses, during the occupation, such as buildings, &c., taken possession of by the military forces, to employ the same for the accommodation of troops, is not necessarily a capture. Case of the Memphis Navy Yard Property, 12 *Opinions of U. S. Attorneys-General*, 125.

<sup>2</sup> *Woolsey's International Law*, § 19, p. 34. In the exercise of the right of *redress*, it may be necessary to strip a wrongdoer of a portion of his territory ; or in the exercise of the right of *self-protection*, and possibly of *punishment*, it may be lawful to deprive him of the means of doing evil. *Id.*, § 21, p. 37.

<sup>3</sup> *Twiss, Law of Nations*, pt. II., 120, §§ 62, 63 ; *Vattel, Droit des Gens*, III., c. 9, § 160.

In the case of *Miller v. The United States*, 11 *Wallace's U. S. Supr. Ct. Rep.*, 268, it was held, that the power of a government to confiscate property exists as fully in case of a civil war as it does when the war is foreign. Rebels in arms against the lawful government, or persons inhabiting the territory exclusively within the control of the rebel belligerents, may be treated as public enemies. So may adherents or aiders and abettors of such belligerents, though not resident within the enemy's territory.

Moneys expended for the support of prisoners of war are to be reimbursed in concluding a peace. *Halleck, Int. Law and Laws of War*, p. 437, § 17.

### *Destroying means of communication.*

**837.** A belligerent, when necessary to prevent the passage of the enemy, or of contraband property, or the carrying on of illegal intercourse, may destroy or impair railways, bridges and other highways of either belligerent, doing as little permanent injury as possible.

### *Destroying facilities of navigation.*

**838.** A belligerent, for the purpose of self-preserva-

tion, may destroy or impair lights, signals, channels and other facilities of navigation, within the territory of either belligerent, doing no more permanent injury than is necessary, and giving reasonable notice before so doing, for the benefit of neutrals;<sup>1</sup> but the use of false lights and signals is unlawful.

<sup>1</sup> In the Franco-Prussian war, 1870-71, the German government gave such notice.

In the case of the obstructing of Southern harbors during the American civil war, the obligation of the government to remove the obstructions when the war should be successfully terminated, was acknowledged.

*Ravaging or laying waste enemy's country.*

**839.** For the purpose of self-preservation, a belligerent may ravage or lay waste the territory of the hostile nation.

See *Lawrence's Wheaton, Elem. of Intern. Law*, p. 598, § 6; *Dana's Wheaton*, § 347; *Twiss, Law of Nations*, pt. II., p. 124, and authorities cited; which sustain the rule that it is allowable in extreme cases, when necessary to accomplish the object of the war. The better opinion of the present day, however, condemns it except when necessary for self-preservation.

*Property exempt from acts of hostilities.*

**840.** The following, so long as not used for a military purpose, are not objects of hostilities, and must be respected and protected by each belligerent, to whomsoever belonging :

1. Light-houses; storm signals; inter-oceanic canals; submarine telegraph cables; and all structures and establishments intended exclusively for the uses of peaceful intercourse; except in the cases provided for by article 838;

2. Palaces and offices of government; halls of legislation and of justice; churches and temples of religion; hospitals; and other establishments of an exclusively religious or charitable character; and,

3. Museums; galleries of art; monuments and works of art; libraries, books and manuscripts; ob-

servatories; and scientific instruments; depositories of state papers, and public archives, of historical records, of scientific instruments, of muniments of property, of judicial and legal documents, and their contents; and all other institutions of civil education and culture.

*Halleck, Intern. Law & Laws of War*, p. 543; *Lieber's Political Ethics*, p. 7, § 15; 1 *Kent's Commentaries*, 92; *Heffter, Europ. Volker*, §§ 130, 131; *Dana's Wheaton*, note, 169, *Belligerent Occupation*, (5); *Lieber's Instructions*, ¶¶ 34-36; *Twiss, Law of Nations*, pt. II., p. 128; and other authorities cited by these authors.

*Property exempt not to be sold or carried away.*

**841.** The property mentioned in the last article can not be sold or removed from the country, by the invader, except when allowed by the treaty of peace.

Such property may be taxed for purposes of government. The rule proposed in this Article is in consonance with the present tendency of the law. For the controversy on this subject, see the authorities cited under the last Article.

In the case of the Marquis de Somerueles, *Stewart's Vice-Adm. Rep.*, 482, a case of paintings belonging to the Academy of Arts at Philadelphia was decreed to be restored, on the ground that the arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection.

*Use of and title to public immovables.*

**842.** When the territory and immovable property of a hostile nation are seized by a belligerent, the title thereto remains in abeyance during military occupation, and until the conquest is made complete;<sup>1</sup> but, subject to article 844, the revenues thereof meanwhile belong to the nation making the capture.

<sup>1</sup> This is the rule adopted by the United States, as stated in *Lieber's Instructions*, ¶ 31. See *Bluntschli, Droit Intern. Codifié*, § 732, &c.

Other writers say that such immovables become the property of the captor, and may be transferred by it, subject, however, to the subsequent fortunes of the war. See *Twiss, Law of Nations*, Part II., p. 126.

Article 968 declares it to be inconsistent with neutrality to take a transfer during war.

*Title to movables.*

**843.** Except in the case provided for by article 896,<sup>1</sup> the title to public movable property of the hostile nation, not exempt by the provisions of this Book, and to movable property contraband of war, or engaged in hostilities or in intercourse which, under the provisions of this Book, is illegal, to whomsoever belonging, when lawfully taken by a belligerent, becomes thereby vested in the nation making the capture; and, after being removed to a place of safety, or after twenty-four hours' firm possession, is transferable by it.

Such movables, and no other, may be declared by the commanding officer to be booty, liable to be appropriated by individual captors.

*Lawrence's Wheaton, Elements of Intern. Law*, p. 598, § 6; *Dana's Wheaton*, § 359; citing *Klüber, Droit des Gens Moderne de l'Europe*, § 254; *Vattel, Droit des Gens*, liv. III., ch. 13, § 196; ch. 14, § 209; *Heffter, Europ. Völker*, § 136. See also *Coolidge v. Guthrie*, 8 *American Law Register*, (N. S.), 22. Booty, (*butin*), as used in the most general sense, has been declared to include all movable property which belongs to members of the hostile nation, and which falls into the belligerent's possession. *Twiss, Law of Nations*, Part II., p. 122, § 64.

All lawful captures and booty belong to the nation by whose authority they are made, or to those to whom such nation awards them. *Lieber's Instructions*, ¶ 45.

*Fioré, (Nouveau Droit Intern., vol. 2, p. 309.)* says, that things, when taken in the vicissitudes of the conflict, such as valuables, arms, &c., do not become truly the property of the conqueror, without a renunciation of the first owner's rights, which may be made by the treaty of peace.

*Wildman, (International Law, vol. 2, p. 29.)* says, that plunder or booty, in a mere continental war, without the presence or intervention of any ships or their crews, has never been important enough to give rise to any question about it. "There is no instance in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom."

<sup>1</sup> As to property captured at sea.

*Revenues held in trust for governing the country.*

**844.** A belligerent having military occupation<sup>1</sup> of any place, may lay taxes and appropriate the public revenues of the place, and the income of the public property, so far as necessary for the maintenance of



civil government.<sup>1</sup> Such revenues and income are held in trust exclusively for the government of the country.

<sup>1</sup> Defined by Article 728.

<sup>2</sup> *Lieber's Instructions*, ¶ 39.

*Public ships surprised by war.*

**845.** Public ships of one belligerent in the ports of another at the commencement of hostilities, or the declaration of war, or coming there afterwards without knowledge of the hostilities or declaration, are free from capture or detention, but may be required to leave immediately, being allowed, if necessary, to take sufficient supplies to reach the nearest port of their own nation.

This Article is new, and is suggested in derogation of war.

*Private property to be respected.*

**846.** Private property, whether tangible or intangible, on land or at sea,<sup>1</sup> and belonging to the enemy or a neutral, can not be in any manner taken or violated, under pretext of war,<sup>2</sup> except in the cases and to the extent allowed by the provisions of this Book.<sup>3</sup>

<sup>1</sup> For the discussion of the right of private property at sea, see note at the beginning of this Chapter ; also *Hautefeuille, des Droits et des Devoirs des Nations Neutres*, tit. III., § 1 ; *Ortolan, Diplomatie de la Mer*, liv. III., ch. 2 ; *Vattel, Droit des Gens*, liv. III., (ed. of 1863 ;) *Grotius, Droit de la Guerre et de la Paix*, (ed. of 1867,) liv. III., vol. 3, p. 35 ; *Fioré, Nouveau Droit Intern.*, 2d part, ch. 8, vol. 2, pp. 314-332.

<sup>2</sup> *Fioré, Nouveau Droit Intern.*, vol. 2, p. 313. This principle, says *Pradier Fodéré*, is now adopted by modern nations, as to property on land. *Id.*, note.

It is embodied in many modern treaties, which provide that in case of war or collision between the two nations, property of whatever nature of their respective citizens, is not subject to seizure or sequestration, nor to any other burdens than those imposed on members of the nation. See treaty between France and Peru, March 9, 1861, 8 *De Clercq*, 193.

The rule proposed by the United States as a condition of their acceding to the treaty of Paris, was, that "all private property at sea, not contraband of war, be exempt from capture."

According to many authorities, however, a nation has the right, *stricti juris*, to seize and confiscate any property of any enemy found in the country on the happening of war. *Dana's Wheaton, Elements of Intern.*

*Law*, note 156, p. 387; 1 *Kent's Commentaries*, 59; *Halleck, Intern. Law and Laws of War*, p. 365; *Woolsey's Intern. Law*, § 118; *Brown v. United States*, 8 *Cranch's U. S. Supr. Ct. Rep.*, 123-129.

*Vattel* says, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration."

The English text writers, like the American, are of opinion that the law of nations is not settled against the right, but in fact admit it. *Manning, Law of Nations*, 167; 1 *Phillimore's Intern. Law*, 115-135.

No transfer of title to all or any movables, being private property, is worked by the mere fact of belligerent occupation of the country. There must be an act of capture or transfer. *Dana's Wheaton, Elem. of Intern. Law*, note 169, p. 432. Private property on land is exempt from confiscation. *Id.*, § 346.

As to *immovables*, the existing rule, according to most authorities, (and *Bynkershoeck*, who contends for the power of absolute confiscation of immovables, admits that in practice the power is not exercised,) is that a belligerent may sequester the profits only of immovables within its territory belonging to enemies, and must reinstate the owner on the return of peace. *Twiss, Law of Nations*, Part II., pp. 118, 126.

The right to confiscate *debts* is contended for on theoretic grounds by some authorities, who, however, do not appear to be sustained by modern usage or by the weight of opinion. *Id.*, Part II., p. 108.

As to debts, *Kent*, (1 *Commentaries*, 65,) states, that it rests in the discretion of the legislative authority of a nation to confiscate private debts or not; but as the exercise of the right is contrary to universal practice, it may "well be considered as a wicked and impolitic right, condemned by the enlightened conscience of modern times."

*Wildman*, (*Intern. Law*, v. II., 10, 11,) speaks of the old rule as more or less mitigated by the wise and humane practice of modern times.

*Phillimore*, (*Intern. Law*, vol. III., 132, *et seq.*), says, "the strict right,—the *summum jus*,—by the reason of the thing and the opinion of every eminent jurist, remains unquestioned."

*Manning*, (*Law of Nations*, p. 129,) says, such debts "may be confiscated by the rigorous application of the rights of war, but the exercise of this right has been discontinued in modern warfare."

*Woolsey*, (*Law of Nations*, § 118,) says, "from the strict theory of hostile relations, laid down above, it would follow, that enemy's property within the country, at the breaking out of war, was liable to confiscation. This principle would also apply to debts due to them at that time."

*Halleck*, (*Intern. Law and Laws of War*, pp. 362-9,) agrees with *Kent*, that the law of nations in this respect can not be considered as changed, so as to prohibit the confiscation. So, also, *Pfeiffer, Kriegereroberung*, § 14.

The state of war itself works no change in the relation of debtor and creditor between the citizens of the respective belligerents, beyond a mere suspension of the remedy. Upon the return of peace, the rights

and obligations continue in force, and the remedies which were in abeyance come again into full operation. Peabody's claim on Texas indemnity bonds, 12 *Opinions of U. S. Attorneys-General*, 74. And a sequestration of debts does not divest the property therein, but only prevents the creditor from recovering them pending the war. *Georgia v. Brailsford*, 3 *Dallas, U. S. Supr. Ct. Rep.*, 1.

As to debts and other personal obligations due from resident debtors to the ejected sovereign, *Dana*, (in his edition of *Wheaton, Elem. of Intern. Law*, note 169, p. 432,) says, that a payment made to a conqueror relieves the debtor from further liability to the extent of the payment made. But it does not cover mere releases or quittances. It is a defense to a second demand to the extent of the coercion and actual payment. A non-resident debtor of the ejected sovereign has not the excuse of coercion; and a payment by him is in his own wrong, and not a defense against the demand of the restored sovereign.

Possession by the military occupant of the documentary evidence of a debt due to the objected State or its inhabitants, does not carry with it the right to the debt itself, so as to make the military occupant the legal alienee of the creditor. *Halleck, Intern. Law and Laws of War*, 451-3; *Heffter, Europ. Volker.*, 134; *Phillimore's Intern. Law*, III., §§ 561-2; *Pfeiffer's Kriegereroberung*, 165-180; *Vattel, Droit des Gens*, liv. III., ch. 14, § 112.

<sup>3</sup> The principal exceptions are: 1. Contraband; 2. Property forfeited by offenses of the owner; and, 3. Property taken under military necessity.

### *Rescue.*

**847.** The rescue by passive enemies or neutrals of any person or thing captured from them at sea or on land, before lawful transfer to a neutral purchasing in good faith and for value,<sup>1</sup> is lawful, if effected without committing an act of hostility.<sup>2</sup>

<sup>1</sup> *Bluntschli, Droit Intern. Codifié*, § 740.

<sup>2</sup> "If a neutral master," says Sir *William Scott*, (in *The Catherina Elizabeth*, 5 *Ch. Robinson's Rep.*, 206,) "attempts a rescue, he violates a duty which is imposed upon him by the law of nations, to submit to come in for inquiry, as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner, and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war." And he further says: "With an enemy master the case is very different. No duty is violated by such an act on his part,—*lupum auribus teneo*,—and if he can withdraw himself he has a right to do so."

See *The Dispatch*, 3 *Ch. Robinson's Rep.*, 278; *The Washington*, 2

*Acton*, p. 30, n. : *The Franklin*, 2 *Id.*, p. 109 ; *The Short Staple v. The United States*, 9 *Cranch's U. S. Supr. Ct. Rep.*, 55.

*Effect of recapture of property of a neutral.*

**848.** Movable property of a neutral nation, or of its members or domiciled residents, recaptured by one belligerent from another, before its condemnation as prize by the latter, must be restored to its owner, on payment of reasonable salvage.

Act of Congress of the United States, March 3, 1800, 2 *U. S. Stat. at L.*, 16 ; and Act of 1864, § 29, 13 *U. S. Stat. at L.*, 314. And see *The Adeline*, 9 *Cranch's U. S. Supr. Ct. Rep.*, 244, 288 ; *The Star*, 3 *Wheaton's U. S. Supr. Ct. Rep.*, 78, 91.

A rescue from the attack of an enemy by approaching with a superior force, is equivalent to a recapture from possession within the rule. *The Ann Green*, 1 *Gallison's U. S. Circ. Ct. Rep.*, 274.

General provisions as to the allowance, &c., of salvage, are contained in Chapter XXXV., entitled SALVAGE. See also Article 890.

*Effect of recapture of property of a belligerent.*

**849.** Private property of a belligerent captured during war, reverts to the owner from whom it was captured, on its coming again under the power of his nation, before the termination of the war, as follows :

1. Immovable property, after any interval of time ;
2. Movable property, captured on land, before its removal to a place of safety, or the expiration of twenty-four hours, as provided by article 843 ; and,
3. Movable property, captured at sea, at any time before its condemnation as prize, as provided by article 896.

If the original capture was unlawful, the property reverts, upon its recapture, at any time previous to judicial condemnation.

*Military burdens of passive enemies.*

**850.** A belligerent, within the limits of his military occupation of hostile territory, may levy forced loans, and billet soldiers ; and may appropriate lands, buildings and ships for temporary military uses.<sup>1</sup> But mem-

bers of neutral nations, lawfully within the territory, are exempt from liability to these burdens.<sup>2</sup>

<sup>1</sup> *Lieber's Instructions*, ¶ 37. The right of eminent domain, defined by Article 50, gives greater power to a nation within its *own* territory.

<sup>2</sup> The provisions of the Book on PEACE, (Article 358,) exempt foreigners from military and naval service. This exemption should not be suspended by war. See *Fioré, Nouveau Droit Intern.*, v. 2, p. 306.

During the German occupation of Paris in 1871, the United States minister endeavored to give protection to the apartments of Americans in Paris, by issuing to the occupants certificates of nationality, and authorizing them to display the American flag. In disregard of these, German soldiers were billeted in the American apartments; but as the occupation was brief, and no substantial injury done, no complaint seems to have been pressed. *Foreign Relations of the United States*, 1871, p. 307. Count *Bismarck* refused to acknowledge on this point the neutral character of real property of neutrals. *Id.*, p. 308.

*Compensation for property taken for military uses.*

**851.** When private property of enemies or neutrals, not being contraband of war, is taken by way of military necessity, the commander making the seizure must give a receipt therefor, unless compensation is made at the time.

*Lieber's Instructions*, ¶ 38.

Compensation may be by agreement, or fixed by the commander.

By the general order of the U. S. War Department, of August 18, 1863, *Gen. Ord.*, v. 2, p. 364, No. 288, in every case of seizure of goods by officers acting under the authority of the department, a true and perfect inventory was required to be made in triplicate; one copy to be given to the person from whom the goods were taken; the others for the officer and the government.

## CHAPTER LXV.

## CONTRABAND OF WAR.

- ARTICLE 852.** Kinds of contraband.  
853. Contraband persons.  
854. Contraband ships.  
855. Contingent destination presumed to be hostile.  
856. Neutral and hostile destination.  
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861. Contraband documents.  
862. Contents of mails not contraband.  
863. Detention and confiscation of contraband.  
864. Freightage of contraband.

By the existing rules of war, the question of contraband is treated solely as a question between neutrals and belligerents. But if commerce not involving contraband, nor interdicted traffic between lines of military occupation, be made generally free, both for passive enemies and neutrals, as proposed by this Book, the doctrine of contraband becomes important as a restriction on intercourse between belligerents. It is, therefore, treated here among the rules applicable to belligerents. Division V., concerning NEUTRALS, contains some further reference to the subject.

The definitions of contraband do not usually include property which is liable to confiscation merely because it is public property of the hostile nation, without reference to its being of a nature to serve the purposes of the war. This usage is recognized in the Articles of this Book. All movable property which belongs to the hostile nation, even though it be not within the definition of contraband, is lawful prize, by Articles 836 and 843.

*Kinds of contraband.*

**852.** The expression "contraband of war," as used in this Code, is applied to,

1. Persons ;
2. Ships ;
3. Goods ; and,
4. Documents.

*Lushington's Naval Prize Law*, p. 34, § 165.

*Contraband persons.*

**853.** Persons are contraband of war, when impressed with the military character of the hostile nation, or when on their way for a military purpose in aid of such nation,<sup>1</sup> but not otherwise.

<sup>1</sup> See Article 736.

<sup>2</sup> The treaties between the United States and the

Dominican } Feb. 8, 1867, Art. XV., 15 *U. S. Stat. at L.*, (Tr.), 167.  
Republic, }

Bolivia, May 13, 1858, " XVI., 12 *Id.*, 1003.

Venezuela, Aug. 27, 1860, " XIV., 12 *Id.*, 1143,

recognize the principle that persons on board a neutral ship, although they may be enemies of both or either party, are not to be taken out of that ship, unless they are officers or soldiers, and in the actual service of the enemy.

By the treaty between France and Peru, March 9, 1861, Art. XX., § 1, (8 *De Clercq*, 200,) it is provided that persons on a neutral ship are free of capture, unless actually in the service of the enemy, or destined to enter it.

In the absence of treaty stipulations, the prohibition has been extended to pretended ministers of a usurping power, not recognized as legal by the captor or the neutral. The principle applies, says Mr. *Sevard*, (Letter in the Trent Case, see *Bernard's Neutrality of Great Britain during the American Civil War*, p. 205,) to civil magistrates sent out on public service and at public expense; and to the bearers and carriers who undertake to carry contraband dispatches.

*Lushington*, (*Naval Prize Law*, p. 39, § 190,) states, that under the present English rule the following persons on board a neutral ship, which has a hostile destination, are contraband:

1. Soldiers or sailors in the service of the enemy, (*Friendship*, 6 *O. Robinson's Rep.*, 420;) and,

2. Officers, whether military or civil, sent out on the public service of the enemy at the public expense of the enemy. The number of such officers is immaterial, (*Orozembo*, 6 *O. Robinson's Rep.*, 430.)

And, (*Id.*, p. 40, § 191,) states, that ambassadors from the enemy to a neutral State are not contraband, and their presence on board a neutral vessel is no cause for the detention of the vessel.

*Contraband ships.*

**854.** Except when exempted under articles 786 and 834, ships are contraband of war, if used or destined for use by the hostile nation in war, and not otherwise.

*Contingent destination presumed to be hostile.*

**855.** When a ship's destination is expressed in her papers to be dependent upon contingencies, it is presumed to be hostile, if any one of the ports which, under any of the contingencies she may be intended to touch at or go to, be hostile; but this presumption may be repelled by clear proof that the master has definitively abandoned a hostile destination, and is pursuing a neutral one.

*Lushington's Naval Prize Law*, p. 37, § 177.

In *The Delta*, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*,) p. 183, and *The Cheshire*, *Id.*, p. 151, it was held that, unless a contingent destination to a blockaded port appear on the ship's papers, it will be presumed that there was a dishonest purpose in approaching such port.

*Neutral and hostile destination.*

**856.** A ship's destination is considered neutral, if both the port to which she is bound and every intermediate port at which she is to call in the course of her voyage be neutral; it is considered hostile, if either the port to which she is bound, or any intermediate port at which she is to call in the course of her voyage be hostile; or if in any part of her voyage she is to go to the enemy's fleet at sea.

*Lushington's Naval Prize Law*, p. 37, § 176, 177.

One of the chief evidences of fraud is a vessel's being out of her regular course leading to the port of destination shown on her papers. *The Joseph H. Toone*, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*,) p. 223.

*Fraud and its effect.*

**857.** The use of false or simulated papers, or false colors, on the part of the master or owner of a ship, for the purpose of deceiving a belligerent, is equivalent to a hostile destination within the last article.

The belligerent has a right to require frank and *bona fide* conduct on the part of neutrals, in the course of their commerce in times of war; and if the latter make use of fraud and false papers to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. Car-



ington v. Merchants' Ins. Co., 8 *Peters' U. S. Supr. Ct. Rep.*, 495 The Louisa Agnes, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), p. 107.

The spoliation of papers, not explained, in connection with the fact that the prize is enemy's property, (*The Zavalla, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), p. 173,) or that she is seized under circumstances which place it in her power to violate a blockade, supplies legal cause for condemnation and forfeiture; *The Mersey, Id.*, p. 187; *The Ella Warley, Id.*, 288. And see *The Stettin, Id.*, 272; *The Maria, Id.*, 283; *The Ella Warley, Id.*, 648; *The Albert, Id.*, 280.

But it has been held that neither the carrying of simulated papers, (*Hobbs v. Henning*, 17 *Common Bench Rep.*, *N. S.*, 791,) nor the spoliation of papers is deemed *per se* a ground for condemning a vessel or cargo, though a strong presumption of fraudulent purposes in those having charge of her, which will effect a condemnation if not satisfactorily accounted for. *The Mersey, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), p. 187.

### *Destination of ship conclusive as to goods.*

**858.** The destination of the ship is conclusive as to the destination of the goods on board.

If the destination of the vessel be hostile, then the destination of the goods on board should be considered hostile also, though it may appear from the papers or otherwise that the goods themselves are not intended for the hostile port, but are intended either to be forwarded beyond it, to an ulterior neutral destination, or to be deposited at an intermediate neutral port. On the other hand, if the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, though it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination, to be attained by transshipment, overland conveyance or otherwise. *Lushington's Naval Prize Law*, p. 37, § 178.

To render goods contraband of war liable to seizure they must be taken in *delicto*: that is, in the actual prosecution of a voyage to an enemy's port. *Hobbs v. Henning*, 17 *Common Bench Rep.*, *N. S.*, 791; 34 *Law Journal*, *C. P.*, 117.

Mr. *Seward*, however, in his letter in the "Trent" case, assumes the British law to be that the circumstance that the ship was proceeding from a neutral port to a neutral port does not modify the right of the belligerent captor.

The rule above stated is preferable, as being in the interest of neutrals, and is generally supported by the English decisions, though in direct conflict with the American authorities.

In the case of the *Bermuda*, 3 *Wallace's U. S. Supr. Ct. Rep.*, 514, it was held, that voyages from neutral ports intended for belligerent, are not protected by an intention of touching at an intermediate neutral port.

Contraband is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect.

*What goods are contraband.*

**859.** Private property of any person whomsoever, and public property of a neutral nation, are contraband of war when consisting of articles manufactured for and primarily used for military purposes, in time of war;<sup>1</sup> and actually destined for the use of the hostile nation in war; but not otherwise.

<sup>1</sup> This rule, the modern sanctions of which are stated below, would exclude from the doctrine of contraband those classes of goods which cause the most embarrassing questions and most frequently threaten the peace of neutrals.

In the absence of treaties, which now, however, are numerous and important, as will appear below, the classification of goods as contraband and not contraband, which is best supported by American and English decisions, says Chief Justice CHASE, in the case of the *Peterhoff*, 5 *Wallace's U. S. Supr. Ct. Rep.*, 58, "may be said to divide all merchandise into three classes. Of these the first consists of articles manufactured, and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes."

"Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

Artillery, harness, men's army bluchers, artillery boots, government regulation gray blankets, are of the first class. *Id.*

Contraband is liable to capture when destined to the hostile country or to the actual military or naval use of the enemy, (according to the above rule,) whether a violation of blockade be intended or not. *Id.*

*Dana* reviews the leading authorities as follows:

"The principal point in dispute is as to articles admitted to be of ambiguous or uncertain use, when in the enemy's country and in time of war."

"One class of writers contends for an absolute rule as to all articles of such descriptions; so that if upon the application of the general test, they are left *incipitis usus*, they must be free, and no further inquiry can be made for the purpose of ascertaining the probable use in the particular case. Another class of writers contends, that as to such articles

inquiry may be made into the circumstances, for the purpose of determining their probable use in the particular instance. The latter rule has been unquestionably the British doctrine, enforced by her orders in council and prize courts, recognized in her treaties, and sustained by her statesmen and text writers. *Reddie on Maritime Intern. Law*, II., 456; *Phillimore's Intern. Law*, III., 245-284; *Wildman's Intern. Law*, II., 210, *et seq.*; *Manning's Law of Nations*, 282, *et seq.*; *Moseley on Contraband*, *passim*. It may also be said, in the main, to have been the American doctrine." *Kent's Commentaries*, I., 140; *Halleck, Intern. Law*, 569-590; *Woolsey, Intern. Law*, §§ 180, 181.

"Professor *Parsons*, (*Marit. Law*, II., 93, 94, Boston, 1859,) thus defines contraband as, in his judgment, settled by the practice of maritime nations: A trade with a belligerent, intended to provide him with military supplies, equipments, instruments or arms. Goods are contraband which are in fact munitions of war, or may certainly become so, or which are designed or capable of being used for the support or assistance of an enemy in carrying on war, offensively or defensively. Thus, even provisions, if they are intended to be sent to a place, which an enemy is attempting to reduce by starvation, and in general, articles ordinarily only used only for peaceful purposes, if capable of a military use, and sent to places where it is probable that such a use will be made of them are contraband of war; and so is all property destined to a besieged or blockaded town."

"Of the continental writers, *Hautefeuille* contends for the absolute rule limiting contraband to such articles as are in their nature of first necessity for war, substantially exclusively military in their use, and so made up as to be capable of direct and immediate use in war. (Tit. 8, § 2, tom. II., pp. 84, 101, 154, 412; tom. III., p. 222.) *Ortolan* is of the same opinion, in principle; and contends that all modern treaties limit the application of contraband to articles directly and solely applicable to war; yet he admits that certain articles not actually munitions of war, but whose usefulness is chiefly in war, may, under circumstances, be contraband; as sulphur, saltpetre, marine steam machinery, &c.; but coal, he contends, from its general necessity, is always free. (Tom. II., ch. p. 6 179-206.)"

"*Massé*, (*Droit Comm.*, I., 209-211,) admits that the circumstances may determine whether articles doubtful in their nature are contraband in the particular case, as the character of the port of destination, the quantity of goods, and the necessities and character of the war. The same view is taken by *Tetens*, a Swedish writer, (*Sur les Droits Reciproques*, pp. 111.-113.) *Hübner*, (lib. II., ch. I., §§ 8, 9,) seems to be of the same opinion with *Tetens* and *Massé*."

"*Klüber*, (§ 288,) says that naval stores are not contraband; but adds, that in case of doubt as to the quality of particular articles, the presumption should be in favor of the freedom of trade."

"The subject is not affected by the Declaration of Paris, of 1856." *Dana's Wheaton, Elements of Intern. Law*, note 226, p. 629.

*Lushington (Naval Prize Law*, pp. 35, 36, §§ 169-172,) states the following rules as embodying the present British law.

"All goods fit for purposes of war only, and certain other goods which, though fit for purposes of peace, are in their nature peculiarly serviceable to the enemy in war, on board a vessel which has a hostile destination, are absolutely contraband."

The list of goods *absolutely* contraband comprises :

Arms of all kinds, and machinery for manufacturing arms ; ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, (chloride of potassium,) chlorate of potash, and nitrate of soda ; gunpowder and its materials, saltpetre and brimstone ; also gun-cotton ; military equipments and clothing ; military stores, naval stores, such as masts, (Charlotte, 5 *C. Robinson's Rep.*, 305 ; Staadt Embden, 1 *Id.*, 27,) spars, rudders, and ship timber, (Twende Brodre, 4 *C. Robinson's Rep.*, 33,) hemp, (Apollo, 4 *C. Robinson's Rep.*, 161 ; Evert, 4 *Id.*, 354 ; Gute Gesellschaft Michael, 4 *Id.*, 94,) and cordage, sail-cloth, (Neptunus, 3 *C. Robinson's Rep.*, 108 ;) pitch and tar, (Jonge Tobias, 1 *C. Robinson's Rep.*, 329 ; Twee Juffrowen, 4 *Id.*, 242 ; Neptunus, 6 *Id.*, 408 ;) copper, fit for sheathing vessels, (Charlotte, 5 *C. Robinson's Rep.*, 275 ;) marine engines, and the component parts thereof, including screw-propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler-plates and fire-bars ; marine cement, and the materials used in the manufacture thereof, as blue lias and Portland cement ; iron, in any of the following forms,—anchors, rivet-iron, angle-iron, round bars of from three-quarters to five-eighths of an inch diameter, rivets, strips of iron, sheet plate-iron exceeding one-quarter of an inch, and low moor and bowling plates.

"All goods fit for purposes of war and peace alike, (not hereinbefore specified as absolutely contraband,) on board a vessel which has a hostile destination, are conditionally contraband ; that is, they are contraband only in case it is to be presumed that they are intended to be used for purposes of war. This presumption arises when such hostile destination of the vessel is either the enemy's fleet at sea, or a hostile port used exclusively or mainly for naval or military equipment."

The list of goods *conditionally* contraband comprises :

Provisions and liquors fit for the consumption of army or navy, (Haabet, 2 *C. Robinson's Rep.*, 182 ; Jouge Margareta, 1 *Id.*, 191 ; Ranger, 6 *Id.*, 125 ; Edward, 4 *Id.*, 68 ;) money ; telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc, (see *Parliamentary Papers, North America*, No. 14, 1863, p. 5, and see note to Article 964 of this Book ;) materials for the construction of a railway, as iron-bars, sleepers, &c. ; coals, (see *Lord Kingsdown's Speech in the House of Lords, May 26, 1861* ;) hay ; horses ; rosin, (Nostra Signora de Begona, 5 *C. Robinson's Rep.*, 98 ;) tallow, (Neptunus, 3 *C. Robinson's Rep.*, 108 ;) timber, (Twende Brodre, 4 *C. Robinson's Rep.*, 37.)

Provisions have not in general been deemed contraband by the modern law of nations, if destined for the ordinary use of life in the enemy's country ; but it has been held that they may become so, although the

property of a neutral, by reason of the particular situation of the war, or of their destination, as if destined for a *military* use. The Commercen, 1 *Wheaton's U. S. Supr. Ct. Rep.*, 382, 387.

And if they are the growth of a neutral exporting country, they are not contraband; but if they are the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, they are not exempt from the contraband character, even though they are destined to a neutral country. *Ib.* Compare *Maisonnaire v. Keating*, 2 *Gallison's U. S. Circ. Ct. Rep.*, 325; *The Stephen Hart, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*,) 387; *The Springbok*, *Id.*, 434; *The Peterhoff*, *Id.*, 463, 528.

In the case of *The Bermuda*, it was held that printing presses, materials and paper, and Confederate States postage stamps, belonging to the enemy, and intended for its immediate use, were contraband. 3 *Wallace's U. S. Supr. Ct. Rep.*, 514, 552.

In very recent treaties, the last two of the three classes, described by Chief Justice CHASE, have been substantially excluded.

Upon the foregoing review of the authorities, two rules are suggested for consideration in framing such a Code as this: One, that of the text, which prohibits only goods manufactured for war use; the other, that which forbids all articles *which, without further manipulation, could serve for immediate military or naval armament*. The latter rule was that adopted by the Italian government, in their instructions to their commanders in the war with Austria, in 1866. *Lushington's Naval Prize Law*, Intro., p. viii., note.

The former rule is, however, so much more definite, and already more or less fully adopted by so many treaties, that it seems preferable, as the more feasible of the two.

The leading treaties are as follows:

By the treaty between France and Peru, March 9, 1861, Art. XXI., (8 *De Clereq*, 201,) contraband is defined as including only articles expressly made for war on sea or land.

The treaties between the United States and

Dominican Republic,	} Feb. 8, 1867, Art. XIII., 15 <i>U. S. Stat. at L.</i> , (Tr.), 167.
Bolivia,	
May 13, 1858, " XVII., 12 <i>Id.</i> , 1003. "	

provide that the liberty of navigation and commerce shall extend to all kinds of merchandise, excepting those only which are distinguished by the name of contraband of war, and under this name shall be comprehended: 1. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fusees, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds, grenades, bombs, powder, matches, balls, and everything belonging to the use of arms; 2. Bucklers, helmets, breast-plates, coats of mail, accoutrements, and clothes made up in military form and for military use; 3. Cavalry belts and horses, with their harness; 4. And gen-

erally, all offensive or defensive arms, made of iron, steel, brass, copper, or of any other material prepared and formed to make war by land or at sea.

The treaty between the United States and the Two Sicilies, Art. III., Dec. 1, 1855, 11 *U. S. Stat. at L.*, 639, enumerates as contraband: cannons, mortars, petards, grenades, muskets, balls, bombs, gun-carriages, gunpowder, saltpetre, matches, troops, whether infantry or cavalry, together with all that appertains to them; as also every other munition of war, and generally every species of arms, and instruments in iron, steel, brass, copper, or any other material whatever, manufactured, prepared, and made expressly for purposes of war, whether by land or sea.

The treaty between the United States and Venezuela, Art. XIII., Aug. 27, 1860, 12 *U. S. Stat. at L.*, 1143, enumerates as contraband the following: gunpowder, saltpetre, petards, matches, balls, bombs, grenades, carcasses, pikes, halberds, swords, belts, pistols, holsters, cavalry saddles and furniture, cannons, mortars, their carriages and beds, and generally all kinds of arms, ammunition of war, and instruments fit for the use of troops.

By the treaty between the United States and the

Dominican Republic,	{	Art. XIV., Feb. 8, 1867, 15 <i>U. S. Stat. at L.</i> , (Tr.), 167.
Bolivia,		
		" XVIII., May 13, 1858, 12 <i>Id.</i> 1003.

all merchandise and things not comprehended in the articles of contraband explicitly enumerated and classified in the treaty, shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by the members of both nations, even to places belonging to an enemy, excepting only those places which are at the time besieged or blockaded.

See also *Katchenovskiy's Prize Law*, by Pratt, p. 118.

It will be observed that *saltpetre*, *matches*, and *horses* mentioned in the foregoing treaties are not included in the definition given in the above Article. The rule there proposed is intended to protect belligerents' rights, and at the same time avoid the mischiefs which result from subjecting other classes of property to capture, and the uncertainty which attends the endeavor to maintain the existing rules. It is not necessary here to review the intricate mass of authorities on questions that would be superseded by the adoption of such a rule as is here proposed.

If it were thought preferable to include all articles which may subserve the purpose of the war, the following clause might be added to Article 859: "And all other articles necessary and intended for the maintenance of armaments and combatants."

*Goods on board ship exempt from capture.*

**860.** All goods of whatever character, on board a ship that is exempt from capture, and not exceeding in

quantity that which may be required for the use of the ship and her crew, are exempt from detention or capture.

*Lushington's Naval Prize Law*, p. 35, § 168.

### *Contraband documents.*

**861.** Documents are contraband, when they are official communications from or to officers of a hostile nation, and fitted to subserve the purposes of the war, but not otherwise.

Sir *William Scott* interprets "despatches," treated of in the decisions as warlike or contraband communications, to be "*official communications of official persons, on the public affairs of the government.*" The *Caroline*, 6 *Ch. Robinson's Rep.*, 465. But to this rule there is an exception in the case of communications to or from a neutral nation, or the hostile nation's ministers or consuls resident in the neutral nation.

As to the effect of war upon the *mail service*, see Article 915.

### *Contents of mails not contraband.*

**862.** The contents of mails upon mail packets, owned or employed by any nation, are not contraband of war.

This rule is suggested as a proper one, although the contrary is now recognized.

*Lushington*, (*Naval Prize Law*, Introd., p. xii.,) says, that to give up altogether the right to search mail steamers and bags, when destined to a hostile port, is a sacrifice which can hardly be expected from belligerents; citing Desp. of Earl Russell to Mr. Stuart, November 20, 1862, *Parliamentary Papers*, No. Amer., No. 5, 1863.

As to suspension of mail service, see Article 915.

### *Detention and confiscation of contraband.*

**863.** Things which are contraband of war are liable to capture and confiscation, and persons who are contraband of war are liable to capture and detention, in the manner provided in this Book; but the ship or contents thereof, not being contraband, are not liable to condemnation nor detention, except as provided by articles 871 and 877.

This rule is drawn from recent treaties, which provide that articles of

contraband, which may be found in a vessel bound to an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship that the owners may dispose of them as they see proper.

See the treaties between the United States and

Bolivia, May 13, 1858, Art. XIX., 12 *U. S. Stat. at L.*, 1003.

Venezuela, Aug. 27, 1860, " XIII., 12 *Id.*, 1143.

The harsher rules now in force between other nations may be briefly indicated thus :

The penalty for carrying contraband goods is confiscation of the goods and the interest which the owner of them may have in the ship or in other goods on board.

The ship in all cases forfeits her right to freightage on the contraband goods, and all right to expenses resulting from her detention.

A ship carrying contraband goods with simulated papers, or in disregard of express stipulations by treaty, is confiscated, with any interest which her owner has in other goods on board. *Lushington's Naval Prize Law*, p. 39, §§ 187-189. See also The Springbok, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*,) p. 434 ; The Stephen Hart, *Id.*, p. 387.

The penalty for carrying contraband persons or despatches is the confiscation of the ship, and such part of the goods on board as belong to her owner. *Lushington's Naval Prize Law*, p. 40, § 196 ; p. 42, § 205.

A ship which is contraband is liable to be confiscated, together with such part of the goods on board as belong to her owner. *Id.*, p. 42, § 208. See also The Bermuda, 5 *Wallace's U. S. Supr. Ct. Rep.*, 28, 59.

In *Carrington v. Merchants' Ins. Co.*, 8 *Peters' U. S. Supr. Ct. Rep.*, 495, it was held to be a general rule that the penalty of confiscation attended the carriage of contraband goods to an enemy, when their capture is made *in transitu* ; and that it applied to the vessel and remaining cargo, only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. But that when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule should seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated.

In the case of *The Isabella Thompson*, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*,) p. 377, it was held, that a neutral consignee, at a neutral port, of a cargo delivered there by a vessel which had brought it from a blockaded port of the enemy, acquired perfect title to it, as against persons who captured it as prize on its subsequent transportation on a neutral vessel, from such neutral port to another neutral port. Upon the presumption that the cargo had been unlawfully brought from a blockaded port, and had been directly laden from the first vessel into the second



vessel, the latter with her cargo might be properly brought into port for adjudication. And had any solidarity of interests between the two vessels in the entire voyage from the enemy's port to the last neutral port, been established by the proofs, or any complicity between them in the enterprise, the captors might well invoke the judgment of the court in condemnation of the enterprise.

If the mild rule suggested in the foregoing Article be adopted, it should perhaps be provided that sailing for a port of an enemy with false or simulated papers, or using false colors shall be a ground for confiscating the ship, and possibly also the cargo on board belonging to the owner of the ship.

If the rule be thought too advanced for general adoption, it is suggested that it be declared that contraband goods subject the ship which is carrying them to detention and confiscation.

### *Freightage of contraband.*

**864.** A ship in which contraband of war is captured, forfeits the freightage thereof.

The Peterhoff, 5 *Wallace's U. S. Supr. Ct. Rep.*, 28, 61.

By the present rule a belligerent nation is bound to pay to a neutral carrier an adequate remuneration for the carriage of goods which are seized upon his ship as contraband of war. And the adequacy of the compensation due for freightage is determined by the terms of the charter party of the ship; for, as stated by *Twiss*, (*Law of Nations*, pt. II., p. 155, § 80,) considerations of various kinds may have influenced the parties to the contract of affreightment, and may have rendered a contract for an advanced rate of freight real and fair between those parties, but the freight as a burden upon the belligerent captors, does not come loaded with these considerations. But the standard, by which the liability of the belligerent captor toward the neutral ship owner is to be measured, is the rate of freightage given for the carriage of similar goods under ordinary circumstances.

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## CHAPTER LXVI.

## VISITATION, SEARCH AND CAPTURE.

- ARTICLE** 865. Right of visitation.  
866. Ships under neutral convoy.  
867. Ships under hostile convoy.  
868. Duty of submission.  
869. Mode of visitation.  
870. Neither boat, persons nor papers to be taken from the ship.  
871. Resistance by force.  
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878. Detention of persons and papers.  
879. Detention in cases of suspicion.  
880. "Spoliation of papers" defined.  
881. Passive enemies or neutrals on board captured ship.  
882. Persons on board a captured armed public ship, or ship without colors.  
883. When ship and cargo must be released.  
884. Duty of prize officer.  
885. Persons and things captured as contraband to be brought before a prize court.  
886. Restoration after unlawful capture.  
887, 888. Liability of commander.  
889. Rights of all ships to defend against attacks.  
890. Salvage.

*Right of visitation.*

**865.** For the purpose of enforcing the provisions of this Book, concerning contraband of war, intercourse, and hostilities, every private or unarmed ship, whether belonging to the enemy or to a neutral, on the high seas,<sup>1</sup> and not exempt by the next article because under con-

voy, is subject to visitation by an armed ship of a belligerent.

<sup>1</sup> The right to visit within the territorial jurisdiction of the visiting nation is secured, both for peace and war, by Article 64.

The right of visiting and searching merchant ships on the high seas, whatever be the ships, whatever be the cargoes, and whatever be the destinations, is an incontestible right of the lawfully commissioned ships of a belligerent nation ; because till they are visited and searched it does not appear what the ships or the cargoes, or the destinations are, and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the right of maritime capture ; because if you are not at liberty to ascertain by sufficient inquiry whether there is property which can be legally captured, it is impossible to capture. Even under the rule that free ships make free goods, the exercise of this right must be admitted, for the purpose of ascertaining whether the ships are free or not. *The Maria*, Opinion of Lord *Stowell*, 1 *Robinson's Rep.*, 36.

By the treaty between the United States and the

Dominican } Feb. 8, 1867, Art. XVI., 15 *U. S. Stat. at L.*, (Tr.), 167,  
Republic, }

Venezuela, Aug. 27, 1860, “ XV., 12 *Id.*, 1143,

it is expressly stipulated that merchant ships in time of war, bound to an enemy's port, shall be obliged to exhibit upon the high seas, or in ports or roads, passports and certificates showing whether their goods are contraband of war.

### *Ships under neutral convoy.*

**866.** A ship under convoy of an armed public ship of a neutral nation is not subject to visitation, if the commander of the convoy verbally give his word of honor that she is a ship of his nation ; and, if destined to a hostile port, that she contains no contraband of war,<sup>1</sup> and no property of the hostile nation, and is not engaged in illegal intercourse.<sup>2</sup>

<sup>1</sup> Treaty between France and

Peru, March 9, 1861, Art. XXIII., 8 *De Clercq*, 201.

Treaty between the United States and

Dominican } Feb. 8, 1867, Art. XIX., 15 *U. S. Stat. at L.*, (Tr.), 167.  
Republic, }

Venezuela, Aug. 26, 1860, “ XVIII., 12 *Id.*, 1143.

Bolivia, May 13, 1858, “ XXIII., 12 *Id.*, 1003.

Substantially the same rule was adopted by Italy in the war of 1866 with Austria. *Lushington's Naval Prize Law*, Introduct., p. viii., note.

See also *Wildman's International Law*, v. 2, p. 121.

In the absence of treaty the right of search of vessels under neutral convoy is asserted. *The Maria*, 1 *Ch. Robinson's Rep.*, 340.

*Twiss*, (*Law of Nations*, Part II., p. 185, § 96,) says, that every belligerent cruiser has a right to insist on verifying the neutral character of every ship which it meets with on the high seas, and which carries a neutral flag; and it is a clear maxim of law that "a neutral vessel is bound, in relation to her commerce, to submit to the belligerent right of search." A neutral merchant accordingly can not adopt any measures, of which the direct object is to withdraw his commerce on the high seas from the free exercise of the right of search on the part of any belligerent cruiser. It is not competent, therefore, for a neutral merchant to exempt his vessel from the belligerent right of search, by placing it under the convoy of a neutral or enemy's man-of-war.

*Kent*, (*Commentaries*, v. 1, p. 154,) says, that the very fact of sailing under the protection of a belligerent or neutral convoy is a violation of neutrality.

*Lushington*, (*Naval Prize Law*, p. 5, §§ 19, 20,) says, that if the state of the wind and weather permit, the commander should communicate his intention to visit by hailing, and then cause his ship to go ahead of the suspected vessel and drop a boat alongside of her. If the state of the wind and weather render such a course impracticable, the commander should require the vessel to be brought to. For this purpose he should give warning by firing successively two blank guns, and then, if necessary, a shot across her bows; but before firing, the commander, if he has chased under false colors, or without showing his colors, should be careful to hoist the (British) flag and pendant.

Compare Articles 65 and 66.

\* The last clause is new.

### *Ships under hostile convoy.*

**867.** Ships of whatever character, under convoy of a public armed ship of the hostile nation, are liable to capture and confiscation as contraband of war.

It may be thought better to retain this rule, upon the ground that the exemption of private property at sea would render military protection by a belligerent unnecessary and offensive.

### *Duty of submission.*

**868.** Every ship subject to visitation, when hailed by a public armed ship of a belligerent nation, must shorten sail, and await the approach of the hailing ship; and if required must submit to visitation as regulated by the next two articles.

*Mode of visitation.*

**869.** The visiting ship must send to the ship visited, a boat bearing the national flag of the former, and an officer in uniform,<sup>1</sup> who shall be received on board, and be permitted to examine the ship and her contents, and the papers relative to the character of both.<sup>2</sup>

If, for any cause, it be impracticable to send a boat immediately, the commander may require the visited ship to lower her flag, and steer according to his orders.<sup>3</sup>

<sup>1</sup> *Lushington's Naval Prize Law*, p. 5, § 25.

<sup>2</sup> Treaty between France and Peru, March 9, 1861, 8 *De Clercq*, 201, Art. XXIII.

<sup>3</sup> *Lushington's Naval Prize Law*, p. 10, § 60. The *Hercules*, 2 *Dodson's Rep.*, 368; The *Edward and Mary*, 3 *Ch. Robinson's Rep.*, 306.

*Neither boat, persons, nor papers to be taken from the ship.*

**870.** The commander of the visiting ship can not require any boat, person, or paper to be brought to his ship from the ship visited, except as provided by articles 877 and 878.

*Lushington's Naval Prize Law*, p. 5, § 18.

Treaty between the United States and the

Dominican } Feb. 8, 1867, Art. XVIII., 15 *U. S. Stat. at L.*, (Tr.),  
Republic, } 167.

Bolivia, May 13, 1858, " XXI, 12 *Id.*, 1003.

Venezuela, Aug. 27, 1860, " XVII, 12 *Id.*, 1143.

*Resistance by force.*

**871.** If the lawful exercise of the right of visitation or search be resisted by force, the resisting ship and the property on board belonging to her owner, are liable to capture and to condemnation.

Resistance alone, though not amounting to combat, is sufficient ground for confiscation. *Wildman's International Law*, vol. 2, p. 122.

If the clause as to convoy in Article 865 be not retained, it should be observed, that resistance by the convoying ship is a resistance by the whole convoy; (*Wildman's Intern. Law*, vol. 2, p. 124, citing, The *Elsabe*, 4 *Robinson's Rep.*, 408;) and that sailing under instructions to resist is equivalent to resistance. (*Ib.*; citing The *Maria*, 1 *Robinson's Rep.*, 374.)

*Detention.*

**872.** If upon visitation and search the commander of the visiting ship be satisfied that there is proper evidence, amounting to probable cause,<sup>1</sup> for the detention of the ship, under the provisions of this Code, he may detain her. It is his duty to give the master an opportunity of explanation, if the case admit of doubt.

*Lushington's Naval Prize Law*, p. 9, § 53.

The right of detention for inquiry is a corollary to the right of visitation and search. If the commander of a belligerent ship of war, having examined the papers found on board a merchant vessel, perceive just and sufficient reasons for detaining her, in order to proceed to a further examination, he may order a prize crew to go on board of her and conduct her to the nearest port belonging to the nation, subject to a full responsibility in costs and damages, if this should have been done without just and sufficient cause in the opinion of a duly constituted court of prize. *Twiss, Law of Nations*, pt. II., p. 184, § 95.

Lord *Stowell*, in his opinion in the case of *The Maria*, 1 *Ch. Robinson's Rep.*, 374, said, "It is a rule of law that the neutral vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office, . . . is to relieve by compensation inconveniences of this kind, if they have happened through accident or error, and to redress by compensation and punishment injuries that have been committed by design."

<sup>1</sup> To constitute a probable cause of capture, it is not necessary that there should be presumptive evidence sufficient to condemn. It is sufficient, if there be circumstances which warrant a reasonable suspicion of illegal conduct. *The George*, 1 *Mason's U. S. Circ. Ct. Rep.*, 24, 29.

*What is proper evidence.*

**873.** The proper evidence, mentioned in the last article, is such as will be admissible before the prize court. It includes:

1. Facts appearing by inspection—as the character of the ship, her equipment, cargo, crew, and passengers;
2. The papers on board of her; and,
3. The testimony of her master and crew.

*Lushington*, (*Naval Prize Law*, p. 9, § 54,) adds, that the commander should remember that evidence of the captors in their own behalf will not be received by the court, at least in the first instance. See *The Fortuna*, 1 *Dodson's Rep.*, 81; *The Charlotte Caroline*, *Id.*, 192, 199; *The*

Heinrich and Maria, 4 *Ch. Robinson's Rep.*, 57; The Haabet, 6 *Id.*, 54; The Glierktigh, 6 *Id.*, 58, n; The Aline and Fanny, 10 *Moore, P. C.* 322.

By the treaty between the United States and the

Dominican } Feb. 8, 1867, Art. XVII., 15 *U. S. Stat. at L.*, (Tr.)  
Republic, } 167,

Venezuela, Aug. 27, 1860, " XVI., 12 *Id.*, 1143,

if it does not appear from the *ship's certificates* that there are contraband goods on board, she shall be permitted to proceed on her voyage.

*Memorandum of visit to be indorsed on ship's papers.*

874. It is the duty of the visiting officer to write upon, or attach to the passport or other document supposed to determine the national character of the ship visited, a memorandum of the visit or search, specifying date and place, and the name of the visiting ship and commander, and to sign his name to the same with the addition of his rank.

*Lushington's Naval Prize Law*, p. 6, § 33; p. 8, § 50.

The instructions to British commanders, in *Lushington's Naval Prize Law*, require the officer having made visitation or search to inquire if the master of the ship has any complaint to make of the manner of the act, or on any other ground, and if so, ask him to reduce it to writing. Also that a memorandum of the visit should be made on the ship's passport.

*Sending in for condemnation.*

875. Except in the cases otherwise provided for in the next two articles, every private ship detained, must be immediately sent to the nearest safe port of the captor's nation<sup>1</sup> for adjudication on the validity of the capture,<sup>2</sup> whether of ship or contents.<sup>3</sup>

Treaty between France and Peru, March 9, 1861, Art. XXV., 8 *De Clercq*, 202.

<sup>1</sup> *Lushington*, (*Naval Prize Law*, p. 14, § 76,) states the following rules for selecting the port of adjudication. It should,

1. Be capable of giving safe harborage to the ship;
2. Be large enough to admit her without unlivery of cargo;
3. Offer easy communication with the prize court; and,
4. Be as near as possible to the place of capture.

In the case of *The Fanny*, 1 *Dodson's Rep.*, 443, Lord *Stowell* held, that if a neutral merchant ship has goods on board an armed ship of the enemy, he betrays an intention to withdraw his goods from visitation and

search,—for it is a *presumptio juris et de jure* that an armed ship will resist visitation and search,—and is deemed to have abandoned the protection of neutrality, and to have adhered to the enemy.

But in the opinion of Chief Justice *Marshall*, in the case of *The Nereide*, (9 *Cranch's U. S. Supr. Ct. Rep.*, 388,) “a neutral merchant had a right to charter and lade his goods on board a belligerent armed vessel, without forfeiting his neutral character:” and the same opinion was held in *The Atalanta*, 3 *Wheaton's U. S. Supr. Ct. Rep.*, 241.

<sup>2</sup> This applies the rule of adjudication to public property of an enemy on a private ship, but not to private property found on a public ship of an enemy.

<sup>3</sup> Contraband despatches, or persons captured at sea, wholly or partly by the agency of naval forces, must be brought in with the ship upon which they were taken, for the like adjudication. See Mr. *Seward's* letter in the *Trent* case.

### *Prize incapable of being sent in.*

**876.** If the captured ship or cargo be not in a condition to be sent into port for adjudication, the captor must cause a survey and appraisement to be made, and the report to be sent to the prize court; but if any of the property can be sold, it must, unless appropriated for the use of the government of the captor, be sold,<sup>1</sup> and the proceeds deposited with the authorized officer of the captor's nation, subject to the order of the prize court.

Suggested by act of Congress of the United States, June 30, 1864, § 1, 13 *U. S. Stat. at Large*, 306.

<sup>1</sup> By the present rule, the sale may be made in any neutral port where the local authorities will allow the same to be brought in and sold. *Lushington's Naval Prize Law*, p. 17, §§ 90, 96; but Division V., concerning NEUTRALS, forbids such use of neutral ports.

### *Surrender of contraband of war.*

**877.** When only the contents of a ship or some of them are subject to condemnation under the provisions of this Book, and they are surrendered by the officer in command, the ship and the rest of the contents remain free, except that if the seizure be made at sea, and the persons or things surrendered can not be transhipped without grave inconvenience, the ship and all its contents may be sent in as provided in article 875.



Treaty between France and Peru, March 9, 1861, 8 *De Clereq*, 200, Art. XXIV.

According to the treaty between the United States and Bolivia, Art. XIX., May 13, 1858, 12 *U. S. Stat. at L.*, 1003, no vessel shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain or supercargo of the vessel will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great or of so large a bulk that they can not be received on board the capturing ship without great inconvenience; but in this as well as in all other cases of just detention, the vessel detained must be sent to the nearest convenient and safe port for trial and judgment according to law.

By the treaty between the United States and the

Dominican } Feb. 8, 1867, Art. XXII., 15 *U. S. Stat. at L.*, (*Tr.*.) 167.  
Republic, }

Venezuela, Aug. 27, 1860, “ XVI., 12 *Id.*, 1143.

if it shall appear from any ship's certificate that there are contraband goods on board, and the commander of the same shall offer to deliver them up, they shall be received on board the belligerent ship of war, and a receipt given therefor, and the ship shall then be at liberty to pursue her voyage, unless the quantity of the contraband goods be greater than can conveniently be received on board the belligerent's ship of war; in which case, as in all other cases of just detention, the ship shall be carried into the nearest safe and convenient port for the delivery of the same.

See also *Katchenovsky's Prize Law*, by Pratt, p. 118.

The principle recognized by these treaties commends itself to general adoption. The difficulty which it presents in the case of contraband persons and dispatches, in relinquishing the existing method of adjudication, may perhaps be obviated by the adoption of a more simple and direct procedure in such cases. See Chapter LXVIII., concerning PRIZE.

### *Detention of papers and persons.*

**878.** The commanding officer of any ship making a capture must,

1. Secure the papers found on board of the captured ship which relate to the prize, and make an inventory of the same, seal them up, and send them, with the inventory, to the prize court in which proceedings are to be had,<sup>1</sup> with a written statement that they are all the papers found, and in the condition in which they were found, or explaining the absence of any, or any change in their condition;

2. Except in the case of a surrender provided for

by article 877, he must send in as witnesses, the master, one or more of the other officers, the supercargo, purser or agent of the captured ship, and any person found on board whom he may suppose to be interested in the captured ship, or to have knowledge respecting its title, national character, or destination ;

3. He must send, in charge of the captured ship, if it be sent in, a competent prize master and crew<sup>2</sup> to navigate the ship ;<sup>3</sup>

4. He must give a receipt for such of the papers of the ship as he retains, which receipt must be annexed to a copy of the papers ;<sup>4</sup> and when persons or things are taken out of the ship as contraband, he must give a receipt therefor, signed by him, with the addition of his rank ;<sup>5</sup>

5. He must allow the master and a sufficient number of the officers and crew of the captured ship to remain on board, to secure the ship and its contents from unlawful interference, until they are delivered into the custody of a prize court ;<sup>6</sup>

6. He must allow all other persons on board, not impressed with the military character of the enemy, nor duly charged with offenses against the captor's nation, under the provisions of this Book, to remain on board until they reach port,<sup>7</sup> if they choose, unless the safe navigation of the ship require their removal.<sup>8</sup>

<sup>1</sup> The custody of the papers of captured vessels belongs exclusively to the prize court. It is the duty of the captors, immediately upon arrival in port, to deliver, upon oath, all the papers of the captured vessel into the registry of the prize court. *The Diana*, 2 *Gallison's U. S. Circ. Ct. Rep.*, 93.

<sup>2</sup> Thus far suggested by Act of Congress of the United States, June 30, 1864, § 1, 13 *U. S. Stat. at Large*, 306.

<sup>3</sup> The rule, that captors ought to allow some of the officers and crew of a captured vessel to remain on board of her, has no reference to the navigation of the ship. It is adopted with a view to prevent embezzlement and fraud, and to bring before the prize court persons who can speak to the national character and proprietary interests of the ship and cargo. The captors are not bound to allow the captured crew to navigate

the ship, nor are the latter bound to perform such duty. The captors are bound to put on board a sufficient crew to navigate the ship. The George, 1 *Mason's U. S. Circ. Ct. Rep.*, 24.

*Lushington*, (*Naval Prize Law*, p. 15, § 79,) says, that the commander should invite, but can not coerce, the master and crew to aid in navigating the prize into port.

<sup>4</sup> Treaty between the United States and the

Dominican } Feb. 8, 1867, Art. XX., 15 *U. S. Stat. at L.*, (*Tr.*), 167.  
Republic, }

Venezuela, Aug. 27, 1860, " XIX., 12 *Id.*, 1143.

Hayti, Nov. 3, 1864, " XXVI., 13 *Id.*, 711.

<sup>5</sup> This clause is new.

<sup>6</sup> It is provided in the treaty between the United States and the

Dominican } Feb. 8, 1867, Art. XXI., 15 *U. S. Stat. at L.*, (*Tr.*), 167.  
Republic, }

Venezuela, Aug. 27, 1860, " XX., 12 *Id.*, 1143,

that it shall not be lawful to remove the master, commander or super-cargo of any captured ship from on board thereof, during the time the ship may be at sea after her capture, or pending the proceedings against her, or her cargo, or anything relating thereto.

And *Lushington*, (*Naval Prize Law*, p. 20, § 110,) says, that the prize master can not subject the master and crew of the captured ship to any unnecessary restraint.

<sup>7</sup> Persons found on board of a captured vessel do not pass with the vessel and cargo into judicial custody. They are subject to the control of the court for their examination; but when the business of the court does not require their detention as examnants, the discharge or detention of such persons rests with the officers of the naval service according to its rules. The *Salvor*, (E. Dist. of Pa.,) 4 *Philadelphia Rep.*, 409. The French courts hold that they are prisoners of war. *Barboux Jurispr. du conseil des Prises*, (Paris and London, 1872.)

<sup>8</sup> This exception should of course be recognized in framing a positive rule.

### *Detention in cases of suspicion.*

**879.** A private ship may be detained by a belligerent on the following grounds of suspicion, if not explained to the satisfaction of the commander ;<sup>1</sup>

1. Carrying no passport such as is required by article 278 ;<sup>2</sup>

2. Carrying any false or simulated passport or other papers affecting the character of the ship, contents or voyage, such as certificate of registry, sea letter, charter-party, logs, builder's contract, bill of sale, bills of lad-

ing, invoices, manifest, clearance, muster roll, shipping articles, bill of health, &c. ;

3. Carrying papers which, in any respect material to the question of contraband, are inconsistent with each other, or with the declarations of the master to the visiting officer ;<sup>3</sup>

4. Withholding from the visiting officer any papers material to the character of the ship, contents or voyage ;

5. Spoliation of papers, of any kind, that were on board the ship ;<sup>4</sup> and,

6. Using false colors or signals, to deceive the bel-ligerent.<sup>5</sup>

<sup>1</sup> The first five subdivisions are in substance taken from *Lushington's Naval Prize Law*, p. 24, §§ 124-163, where a list of the usual ship's papers for each of the leading commercial nations is given.

<sup>2</sup> Ships must be furnished with sea letters or passports, expressing the name, property and bulk of the ships, as also the name and place of habitation of the master and commander of the ship ; and when laden, they shall also be provided with certificates containing the several particulars of the cargo, and the place whence the ship sailed, which shall be made out by the officers of the place whence the ship sailed ; and when without these papers, ships may be detained, to be adjudged by the competent tribunal, and may be declared legal prize, unless the defect of papers shall prove to be owing to accident. Treaty between the United States and Bolivia, Art. XXII., May 13, 1858, 12 *U. S. Stat. at L.*, 1003.

A passport is issued in the name of a sovereign power or State ; but a " sea letter " or " certificate " is issued in the name of the civil authorities of the port from which the vessel is fitted out.

*Twiss*, in his *Law of Nations*, pt. II., p. 188, § 94, states the present rule to be, that where treaties exist in regard to the exhibition of a pass or sea letter, such ships only as are furnished with the specified pass or sea letter are entitled to the treaty privileges, whatever they may be. In other cases the pass is not in the present day an indispensable document, if there are other papers on board, which satisfactorily establish the character, property and destination of the ship and cargo. Amongst them the most important is the builder's contract, or the bill of sale, in case the ship has never changed owners ; and in addition the certificate of registry, if the municipal law of the port, from which the ship hails, re-quired that she should be registered. If these two papers are on board and their *bona fides* is not impeached, the proof of the property as re-

gards the ship will be sufficiently complete, so far as documentary evidence is concerned. With regard to the cargo, if the ship is a general ship, her *manifest* and the *bills of lading* are the best evidence of both the ownership and the destination of the cargo. If, on the other hand, the vessel should be chartered, the *charter-party* should also be on board; but the absence of the charter-party will not justify the condemnation of the ship, any more than the absence of the invoice of the goods; but the non-production of any ship's paper, which is in strict law documentary evidence either in regard to the ship herself or to the cargo, will justify the sending the vessel into port for inquiry, in order that the master may account satisfactorily before a court of prize for the absence of the missing document.

<sup>3</sup> A nation can not be bound by the flags or papers used by a ship; but can go behind the ostensible neutral character indicated by these, and ascertain the actual character. The belligerent may hold the ship concluded by the fact of having used the flags and papers she has knowingly carried, if that result is favorable to the interests of the belligerent. *Dana's Wheaton, Elem. of Intern. Law*, § 340, note 163.

<sup>4</sup> It is no excuse for spoliation to allege that the papers destroyed were private papers not affecting vessel or cargo. *The Two Brothers*, 1 *Ch. Robinson's Rep.*, 132.

In the case of *The Pizarro*, 2 *Wheaton's U. S. Supr. Ct. Rep.*, 227, it was held, that concealment or spoliation of papers is not of itself a sufficient ground for condemnation in a prize court. It is undoubtedly a circumstance calculated to excite suspicion. But it is open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explain it to the satisfaction of the court, it deprives him of no right to which he was otherwise entitled.

<sup>5</sup> See Articles 61, 764, and 766.

### “*Spoliation of papers*” defined.

**880.** Spoliation of papers is the willful destruction or throwing overboard of any papers on board a ship, for the purpose of deceiving a belligerent.

### *Passive enemies or neutrals on board captured ship.*

**881.** Passive enemies or neutrals on a captured ship, if they are not contraband of war, nor charged with an offense against the provisions of this Book, are entitled to immediate release, except that if required as witnesses they may be carried into the port of adjudication

and detained according to law, until their testimony can be secured, and no longer.

*Instructions of United States Navy Department*, of May 9, 1864, modified so as to include all passive enemies as well as neutrals.

It is provided by the treaty between the United States and the

Dominican Republic, } Art. XXI., Feb. 8, 1867, 15 *U. S. Stat. at L.*, (Tr.), 167.

Venezuela, " XX., Aug. 27, 1860, 12 *Id.*, 1143,

that in all cases where a vessel of the members of either nation shall be captured or seized or held for adjudication, her officers, passengers and crew shall be treated hospitably, and shall not be imprisoned or deprived of any part of their wearing apparel, nor of the possession and use of their money, not exceeding for the captain, supercargo, mate and passengers, five hundred dollars each, and for the sailors one hundred dollars each.

*Persons on board a captured armed public ship or ship without colors.*

**882.** Persons captured in a public armed ship or in a ship without passport or colors, are prisoners of war, unless they are passengers only, having no interest in ship or cargo, and not charged with an offense against the provisions of this Book.

*Instructions of United States Navy Department* of May 9, 1864, extended.

*When ship and cargo must be released.*

**883.** The ships visited, and articles not transhipped under article 877, though found proper to be detained, must be released by the commander of the visiting ship, in either of the following cases :

1. If the surveying officers report the ship to be not in a condition to be sent to a proper port ;

2. If the commander is unable to spare a prize crew to navigate the ship ; or,

3. If, after detention, further facts come to his knowledge, showing that the ship has been improperly detained.

*Lushington's Naval Prize Law*, p. 18, § 100, omitting the exception by which ships belonging to the enemy may be destroyed.

*Duty of prize officer.*

**884.** The prize officer of a captured ship must make

his way diligently to the selected port, and deliver to the proper authorities of his nation the documents and papers and the inventory, and make affidavit that they are the same, and in the same condition as delivered to him by the commanding officer of the ship making the capture, or explaining any absence or change of condition therein, and that the prize is in the same condition as delivered to him, or explaining any loss or damage thereto; and must deliver the persons sent as witnesses into the custody of the prize court, and retain the prize in his charge until it shall be taken therefrom by process from the prize court.

Act of Congress of the United States, June 30, 1864, § 3, 13 *U. S. Stat. at Large*, 306.

*Persons and things captured as contraband to be brought before a prize court.*

**885.** Except in the case of a voluntary surrender, by the master of a ship captured or detained, as provided in article 877, or of a sale under article 876, all persons and things captured at sea as contraband of war, must be brought on shore in presence of the competent officers of the prize court, and an inventory of such things be made by them; and any interference with such persons or things, and any sale of the things, without lawful process of a prize court, is unlawful.

Treaty between the United States and

Dominican Republic, } Feb. 8, 1867, Art. XX., 15 *U. S. Stat. at L. (Tr.)* 167.  
Venezuela, Aug. 27, 1860, " XIX., 12 *Id.*, 1143.

*Restoration after unlawful capture.*

**886.** It is the duty of a belligerent, having seized persons and things in violation of the provisions of this Book, to set such persons at liberty, to restore such things to their owners, and to give indemnity for the injury.

By the existing rule, a prize captured in violation of neutrality is only restored on demand of the neutral nation; but it seems to be in harmony

with the other provisions of this Book, to disallow this qualification of the obligation, although the usual mode of obtaining redress may be by application of the neutral government.

*Lushington*, (*Naval Prize Law*, p. 62, §§ 266, 267,) says, that a ship in neutral territorial waters is not liable to visit, search, or detention, even though beyond those limits when first descried or chased. And he adds, that if a commander ascertain that his capture was made in such waters, he must release the prize, if express application be made by the authorities of the neutral territory.

### *Liability of commander.*

**887.** The commander ' of a visiting ship is responsible, in person and property, for making a capture without probable cause ;' and for all losses by inevitable accident resulting therefrom, during the detention of the ship ;' for any extortion, insult or violence ' caused to persons on board the visited ship ; for any embezzlement, ' wrongful spoliation of property ' on board such ship, or other abuse of his lawful authority ;' and, upon a restoration of the property, for any loss occurring to ship or cargo from neglect of ordinary care in respect thereto, ' or in consequence of a deviation from a direct route to the port of adjudication ;' for unnecessary delay in sending the ship into port, ' or in initiating or prosecuting proceedings for adjudication. '11

<sup>1</sup> The existing rule in respect to captures by public ships is, that the actual wrong-doer alone is responsible for any wrong done or illegality committed on the prize, excepting acts done by members of the seizing vessel in obedience to the orders of their superiors. *The Louisa Agnes*, (*Blatchford's Prize Cases*, *U. S. Dist. Ct.*,) p. 107. By the above Article the commander alone is made responsible ; but perhaps the liability should be extended to others engaged with him.

<sup>2</sup> Every marine-capture is at the peril of the party. The captor must show just grounds for the violence, or he is liable for damages. *Miller v. The Resolution*, 2 *Dallas*, (*Fed. Ct. of App.*) *Rep.*, 1 ; *Del Col v. Arnold*, 3 *Dallas* (*U. S. Supr. Ct. Rep.*) 333 ; *Murray v. The Charming Betsey*, 2 *Cranch's U. S. Supr. Ct. Rep.*, 64 ; *Nealey v. Shattuck*, 3 *Id.*, 458 ; affirming *S. C.*, 1 *Washington's U. S. Circ. Ct. Rep.*, 245 ; *Hollingsworth v. The Betsey*, 2 *Peters' Adm. Rep.*, (*U. S. Dist. Ct.*,) 330.

A belligerent cruiser that with probable cause seizes a neutral and takes her into port for adjudication, and proceeds regularly, is not a wrong-doer ; the act is not tortious. The order of restoration proves that



the property was neutral; not that it was not taken without probable cause. *Jennings v. Carson*, 4 *Cranch's U. S. Supr. Ct. Rep.*, 2. To similar effect, *The Liverpool Packet*, 1 *Gallison's U. S. Circ. Ct. Rep.*, 513; *The Rover*, 2 *Id.*, 240; *Maisonnaire v. Keating*, 2 *Id.*, 328.

If a captor transcend his powers and rights, he becomes guilty of a marine trespass, and is amenable in damages for the injury sustained; and where the vessel has been lost in consequence of such illegal acts, the value of the vessel, the prime cost of the cargo, with all charges and the premium of insurance, are to be allowed in ascertaining the damages. *The Anna Maria*, 2 *Wheaton's U. S. Supr. Ct. Rep.*, 327.

If a ship be detained without probable cause, the liability of the commander extends, says *Lushington*, (*Naval Prize Law*, p. 9, §§ 56, 57,) to the extent of making good losses by inevitable accident while the prize was in his hands. If there was probable cause, he is not liable for casualties.

<sup>4</sup> By the treaty between the United States and the

Dominican } Feb. 8, 1867, Art. XVIII., 15 *U. S. Stat. at L.*, (Tr.) 167.  
Republic, }

Bolivia, May 13, 1858, " XXI., 12 *Id.*, 1003,  
the commanders of the public armed ships of either nation are made responsible with their persons and property for any *extortion, violence or ill-treatment* caused, when visiting ships of the other nation on the high seas.

And by the treaty between the United States and Venezuela, Aug. 27, 1860, Art. XXII., 12 *U. S. Stat. at L.*, 1143, the commander is also made liable for all damages, and the interest thereof, of whatever nature the damages may be.

<sup>5</sup> *Lushington's Naval Prize Law*, p. 20, § 109.

<sup>6</sup> Misconduct on the part of the captors,—*e.g.*, a wrongful spoliation of property on board a prize, or separation of the officers or crew from her, may destroy the legality of the capture, and subject the captors, personally, to punishment for the infringement of the laws of maritime warfare. The right of seizure by the belligerent is dependent upon the lawful use of that power by the captors at sea. *The Jane Campbell*, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*,) 101.

<sup>7</sup> Treaty between France and Peru, March 9, 1861, Art. XXV., 8 *De Clercq*, 201.

<sup>8</sup> There is no rule of law which requires a captor to exercise *extraordinary diligence* in the care of a prize. The case is not distinguishable in this respect from that of a bailment, beneficial to both parties; and the captor is liable for ordinary diligence only. *The George*, 1 *Mason's U. S. Circ. Ct. Rep.*, 24.

<sup>9</sup> The commander is bound to use the strictest care. Omission to employ a pilot in places where pilotage is usual is want of care. *Lushington's Naval Prize Law*, p. 19, §§ 105–108.

<sup>10</sup> *Lushington's Naval Prize Law*, p. 13, § 71; and cases cited.

<sup>11</sup> *Id.*, p. 21, § 115.

*The same.*

**888.** The commander of a visiting ship is responsible in damages for the wrongful acts of all under his command, whether he himself be present or absent, when they are committed. He is not exonerated by being under a superior officer, unless the latter was actually present and co-operating, or issued express orders to do the act in question.

*Lushington's Naval Prize Law*, p. 2, § 7 ; *The Mentor*, 1 *Ch. Robinson's Rep.*, 179 ; *The Diligentia*, 1 *Dodson's Rep.*, 404 ; *The Actæon*, 2 *Id.*, 48 ; *The Eleanor*, 2 *Wheaton's U. S. Supr. Ct. Rep.*, 346.

*Right of all ships to defend against attack.*

**889.** Subject to the provisions of this Chapter, every ship, whether public or private, has a right to repel the attack of an enemy,<sup>1</sup> and to capture and send in as prize the attacking ship.<sup>2</sup>

<sup>1</sup> *Haven v. Holland*, 2 *Mason's U. S. Circ. Ct. Rep.*, 230 ; *The Marianna Flora*, 11 *Wheaton's U. S. Supr. Ct. Rep.*, 1 ; affirming 3 *Mason's U. S. Circ. Ct. Rep.*, 116.

<sup>2</sup> *The Anne*, 3 *Wheaton's U. S. Circ. Ct. Rep.*, 435.

*Salvage.*

**890.** Where property captured in war is recaptured at sea, the recaptors may send it into a court of adjudication, in order to have their claim of salvage established.

See *Halleck, Intern. Law and Laws of War*, p. 867 ; and note to Article 893.

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## CHAPTER LXVII.

### BLOCKADE.

It is thought that the abandonment of the right of making purely commercial blockades will be but a small sacrifice of belligerent power, compared with the immense diminution it will effect in the evils of war. It has been remarked by *Lushington*, (*Naval Prize Law*, Intro..

p. xiii,) that the effect of steam commerce will be to make such blockades, if not more rare, at any rate, of less significance than formerly; since only to ports very exceptionally situated will the temporary loss of maritime intercourse be a very serious matter so long as there is left open to them land communication by railway.

ARTICLE 891. Objects of blockade.

892. "Military port" defined.

### *Objects of blockade.*

**891.** A belligerent may blockade military ports, and no others, and so far only as is necessary to capture contraband of war.

### *"Military port" defined.*

**892.** A military port is a fortified port or one occupied by a military force larger than is necessary for the preservation of domestic order.

The principal existing rules, as modified by modern treaties, may be indicated as follows:

1. *Objects of blockade.* A belligerent may blockade all or any part of the coasts, ports and roadsteads of the hostile nation, so far as necessary for attaining the object of the war.

A war must exist *de facto*; but a civil war in which one party claims sovereign rights as against the other, is within the rule. Prize Cases, 2 Black's U. S. Supreme Court Rep., 635. And in the case of *The Mary Clinton*, Blatchford's Prize Cases, (U. S. Dist. Ct.,) 556, it was held that the proclamation of the blockade is sufficient and conclusive evidence of the existence of the war.

2. *Classes of blockades.* Blockades are either, 1, simple; or, 2, public.

A public blockade is one which has been duly notified to other nations by the nation establishing it. All others are simple blockades.

In the case of a simple blockade, captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance, in order to protect themselves from the penalties of attempted violation. The case of *The Circassian*, 2 Wallace's U. S. Supr. Ct. Rep., 135, (see *Bluntschli, Droit International Codifié*, § 831), allows an effective blockade in anticipation of notice.

3. *Authority of officer.* A blockade of any port established by a commanding officer is not void for want of special authority, unless disavowed by his government. Some authorities question the right of an

officer to establish a blockade without instructions, if he be near enough to the government to enable him to receive them; but the better opinion seems to be that the neutral can not impeach the officer's authority so long as the act is not disavowed by his government. *Halleck, Intern. Law and Laws of War*, p. 537; and see *The Circassian*, 2 *Wallace's U. S. Supr. Ct. Rep.*, 135; *In re Rolla*, 6 *Robinson's Adm. Rep.*, 364; *Cameron v. Kyte*, 3 *Knapp, P. C.* 332.

4. *Notice.* A private neutral ship destined for a blockaded port can not be seized, unless notice of the blockade has first been given to it, and indorsed upon its papers by a ship of the blockading squadron. The indorsement must state the day and the place of giving such notice. Treaty between France and Peru, Art. XXII., March 9, 1861, 8 *Déclercq*, 201. The same rule was adopted by Italy in the war of 1866, with Austria. *Lushington's Naval Prize Law, Introd.*, p. ix., note.

The mere intention to enter a blockaded port unconnected with any other fact, is not sufficient for the condemnation of a neutral vessel.

The treaty between the United States and Great Britain provides that every vessel may be turned away from every blockaded or besieged port or place, which shall have sailed for the same without knowledge of the blockade or siege; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper. And this treaty is conceived to be a correct exposition of the present law of nations upon this point. The intention must be manifested in such manner as to be equivalent to an attempt. *Fitzsimmons v. Newport Ins. Co.*, 4 *Cranch's U. S. Supr. Ct. Rep.*, 185.

See also treaty between the United States and

The Two Sicilies,	}	Oct. 1, 1855, Art. II., 11	<i>U. S. Stat. at L.</i> , 639.
Bolivia,		May 13, 1858, " XX., 12	<i>Id.</i> , 1003.
Venezuela,		Aug. 27, 1860, " XII., 12	<i>Id.</i> , 1143.
Dominican Republic,	}	Feb. 8, 1867.	15 <i>Id. (Tr.)</i> 167.

In the absence of such a treaty, the courts do not require notice; see 5 *Cranch's Rep.*, 335; 1 *Kent's Commentaries*, 150; 1 *Robinson's Rep.*, 72, 130; 2 *Id.*, 94; *The Circassian*, 2 *Wallace's U. S. Supr. Ct. Rep.*, 135; *Wheaton on Capture*, 193-207; *The Hallie Jackson, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), 2, 48; *The Empress, Id.*, 175; except where the vessel sails without a knowledge of the blockade; *The Nayade*, 1 *Newberry's Adm. Rep.*, (*U. S. Dist. Ct.*), 366.

In the case of the *Louisa Agnes, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), p. 107, it was held that the departure of a ship from the blockaded port, under the compulsory direction of a blockading cruiser, does not reintegrate her to the state of an innocent trader, and she may still be arrested for the offense of attempting to violate the blockade.

A notice of a blockade to the officials of a neutral government is

deemed a sufficient notice of it to the subjects of such government. 2 *Ch. Robinson's Rep.*, 113; 1 *Kent's Commentaries*, 147; *Wheaton on Capture*, 193-199; *The Hiawatha, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), 1.

5. *Efficiency.* Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast by the enemy. Congress of Paris, 1856.

Although this rule admits occasional absence of blockading vessels, from stress of weather or other contingencies, yet the law demands the allotment and stationing of that amount of force for the service which shall render it physically hazardous for other craft to evade the blockade. 1 *Kent's Commentaries*, 144-161; 3 *Phillimore's Intern. Law*, 287; *Woolsey's International Law*, § 186; 1 *Spink Prize Cases*, 111, 171; *The Sarah Starr, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), 69.

In the case of an inland port, a blockade may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent vessels, and capture offending vessels attempting to enter. *The Circassian*, 2 *Wallace's U. S. Supr. Ct. Rep.*, 135.

A blockade ceases whenever the vessels which maintain it are withdrawn, whether with or without compulsion from the enemy, so that the undertaking is, for the time, at least, abandoned. *Woolsey's International Law*, § 187.

6. *Violation.* Unless the blockade be directed against ingress or egress alone, a vessel violates the law of blockade, by any positive act towards entering or quitting, or by showing a clear and speedy intention to enter or leave a blockaded port, except in distress. *The Coosa*, 1 *Newberry's Admiralty Rep.*, (*U. S. Dist. Ct.*), 393; 1 *Ch. Robinson's Rep.*, 86, 151, 171; *The Hiawatha, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), p. 1; *The Empress, Id.*, p. 175; *Halleck's Intern. Law & Laws of War*, ch. 23, § 23.

A remote intention to violate a legal blockade, entertained at the outset of the voyage, is not sufficient cause to authorize the seizure of a vessel. *Woolsey's Intern. Law*, § 188.

However earnestly the criminal intent may have been entertained and proceeded upon for a time, if it be really given up before the arrest, the property is not liable to confiscation because of the previous wrongful purpose. 1 *Kent's Commentaries*, 147; *The John Gilpin, Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), 291.

Persisting in the *intention* to enter a blockaded port, after warning by the blockading force, is not an *attempt* to enter, nor a breach of the blockade, unless connected with some act on the part of the vessel.

Under the treaty between the United States and Great Britain, a second attempt to enter must be made after notification of the blockade. Linger about the place, as if watching for an opportunity to sail into it, or the single circumstance of making immediately for some other port,

or, possibly, obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. But whether these circumstances or others may or may not amount to evidence of the offense, the offense itself is, attempting again to enter; and unless, "after notice, she shall again attempt to enter," the two nations expressly stipulated that she shall not be detained. *Fitzsimmons v. Newport Ins. Co.*, 4 *Cranch's U. S. Supr. Ct. Rep.*, 185.

In the absence of such a treaty, however, where a ship knew of the blockade at the time of sailing, her approaching the blockaded port for the purpose of inquiring there, is, in itself, a consummation of the offense; and amounts to an actual breach. *The Cheshire*, 3 *Wallace's U. S. Supr. Ct. Rep.*, 231; *The Delta*, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*), 654.

The inquiry can not be lawfully made at the blockaded port, if it can be made elsewhere. *The Empress*, *Id.*, p. 175.

A clear necessity, however,—*e.g.*, for repairs, supplies or shelter,—will justify an entrance into a blockaded port; but such allegations are regarded with distrust, and satisfactory evidence is required of the reality and urgency of the necessity. *The Major Barbour*, *Id.*, p. 167; *The Sunbeam*, *Id.*, p. 316; *The Diana*, 7 *Wallace's U. S. Supr. Ct. Rep.*, 354.

7. *Penalty.* The penalty for a violation of blockade is confiscation, and attaches to both ship and cargo; which penalty continues upon a vessel until the end of her return voyage. *Woolsey's International Law*, § 188; *The Wren*, 6 *Wallace's U. S. Supr. Ct. Rep.*, 582.

## CHAPTER LXVIII.

### PRIZE.

ARTICLE 893. Prizes must be brought in for adjudication.

894. Possession necessary to jurisdiction.

895. Adjudication.

896. Title not divested until judgment.

897. Previous liens.

898. Requisites of judgment condemning prize.

899. Capture by unlawful means.

900. Jurisdiction of remedy against wrong-doer, in case of illegal capture.

901. Trial of contraband persons.

902. Uniform procedure.

*Prizes must be brought in for adjudication.*

893. All property 'captured' by a belligerent at sea

or afloat on navigable waters,<sup>3</sup> except public armed ships of the hostile nation, and their contents, and except in the case provided for by article 876,<sup>4</sup> must be brought into a port within the territory or the lines of military occupation of the belligerent or of its ally,<sup>5</sup> and submitted with the proofs sustaining the right of capture to a prize court of the captor.<sup>6</sup>

This Article, in connection with others, would extend the requirement of a judicial determination of the lawfulness of a capture, to the case of contraband in an unarmed hostile vessel, and even to public property of the hostile nation, on such a vessel.

<sup>1</sup> The qualification restricting the rule to captures made wholly or partly by naval forces, may properly be omitted. The necessity for adjudication rests on the propriety of submitting the title of water-borne property to judicial inquiry. The kind of force by which the capture is made is not necessarily material.

In the case of the United States *v.* Bales of Cotton, (1 *Woolworth's U. S. Circ. Ct. Rep.*, 236, 257,) it was held that vessels, which are not armed, and are not commanded by government officers, but are used merely as transports for troops, are not war vessels, and do not bring within the prize jurisdiction a capture on land. Also that conjunct captures on land of enemy's property by both army and navy are brought within the prize jurisdiction only by statute.

<sup>2</sup> The propriety of proceeding in a prize court, in case of a recapture was established in the case of the schooner *Adeline*, 9 *Cranch's U. S. Supr. Ct. Rep.*, 244, 286; and *Story*, J., in delivering the opinion of the court, intimates that such proceeding is necessary, but the question of necessity was not directly before the court.

The provisions of this Book would require it where a question of salvage arises, not otherwise.

<sup>3</sup> In *Brown v. United States*, 8 *Cranch's Rep.*, 139, pine timber, part of a ship's cargo, which had been unladed and put into the water in a shallow creek, where at low tide the ends of the logs rested in the mud, was treated as property found on land.

<sup>4</sup> Mr. *Seward*, in his letter in the Trent case, recognizes an exception when it is impossible to bring in the prize, from circumstances beyond the control of the captor, and without his fault.

<sup>5</sup> Possession in a neutral port is enough, by the existing law. *Hudson v. Guesteer*, 4 *Cranch's U. S. Supr. Ct. Rep.*, 293. But the provisions proposed in Division V., concerning NEUTRALS, make this change proper.

<sup>6</sup> The courts of a neutral nation have no jurisdiction of a capture by a belligerent, except in case of a violation of its neutrality. The *Divina Pastora*, 4 *Wheaton's U. S. Supr. Ct. Rep.*, 52.

*Possession necessary to jurisdiction.*

**894.** A prize court has jurisdiction only so long as the nation making the capture, or its ally, has possession of the prize, or its proceeds.

*Hudson v. Guesteer*, 4 *Cranch's U. S. Supr. Ct. Rep.*, 293 ; *The Invincible*, 2 *Gallison's U. S. Circ. Ct. Rep.*, 29. Compare *Maissonaire v. Keating*, 2 *Id.*, 325 ; *The Arabella*, 2 *Id.*, 368.

*Adjudication.*

**895.** If, upon examination, the capture is adjudged lawful, the property may be disposed of according to the law of the captor's nation. If adjudged unlawful, either in respect to the cause or the mode of capture, or the authority of the captor, the property must be restored to its owner.

Three principal questions may be expected to arise under the provisions, subjecting only those things which are contraband of war, or engaged in illegal traffic, to capture at sea, and by public vessels alone :

1. Was the subject of capture lawful prize as contraband, or as engaged in interdicted traffic ?
2. Was the captor impressed with the military character of a belligerent ?
3. Were the place and mode of capture and detention such as to render them legal ?

All of these seem to be proper questions for adjudication, under such a rule as is here proposed.

By the settled rule in England and America, the owner of captured property can not contest the capture on the ground of a want of authority on the part of the persons who made the capture. But this rule seems to be founded on the right of government to adopt a capture by a non-commissioned vessel ; and as this right may be renounced, the legality of the capture may properly be contested in this respect, as in others.

*Title not divested until judgment.*

**896.** The title to property mentioned in article 893, is not changed by capture, but only by the judgment of a court of prize having jurisdiction under the provisions of this Chapter.

In *Josefa Segunda*, (5 *Wheaton's U. S. Supr. Ct. Rep.*, 338,) it was held that where the capture is made by a regularly commissioned captor, he acquires a title to the captured property, which can only be divested by recapture, or by the sentence of a competent prize court.



*Previous liens.*

**897.** Capture and condemnation as prize override all previously existing liens.

The *Battle*, 6 *Wallace's U. S. Supr. Ct. Rep.*, 498.

As against captors, the ownership of property can not be changed while it is in transit. The capture, followed by condemnation, clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage; and anything done thereafter, designed to incumber the property, or to change its ownership, is a nullity. *The Sally Magee*, 3 *Id.*, 451.

*Requisites of judgment condemning prize.*

**898.** A judgment of a prize court sustaining the validity of a capture must contain or be accompanied by a statement of the grounds on which it is founded.

Treaty between France and Peru, March 9, 1861, Art. XXV., 8 *De Clercq*, 201.

The sentence of a prize court condemning a vessel is not conclusive as to any matter of fact which was the ground of condemnation, unless that matter of fact be clearly and certainly stated in the judgment as a ground of condemnation. *Hobbs v. Henning*, 17 *Comm. Bench Rep.*, *N. S.*, 791; 11 *Jurist*, *N. S.*, 223; 34 *Law. Jour.*, *C. P.*, 117; 13 *Weekly Rep.*, 431; 12 *Law Times*, *N. S.*, 205; *Christie v. Secretau*, 8 *Term Rep.*, 192; *Bolton v. Gladstone*, 5 *East's Rep.*, 155; 1 *Smith*, 372; 2 *Taunton's Rep.*, 85. But such sentence is not evidence of what may be gathered from it by way of inference. *Fisher v. Ogle*, 1 *Campbell's Rep.*, 418; *Dalgleish v. Hodgson*, 5 *Moore & Payne's Rep.*, 407.

*Capture by unlawful means.*

**899.** A capture made by means involving a violation of neutrality or the breach of any provision of this Book, is an unlawful capture.

An illegal outfit, or augmentation of force, in a neutral country, not only involves liability for personal penalties, but also infects captures subsequently made during the same cruise, with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. *The Santissima Trinidad*, 7 *Wheaton's U. S. Supr. Ct. Rep.*, 283; *The Grace Para*, 7 *Id.*, 471.

*Jurisdiction of remedy against wrong-doer, in case of illegal capture.*

**900.** After a capture has been duly adjudged illegal, any court of otherwise competent jurisdiction in any

nation a party to this Code, may give a remedy against the wrong-doer.

The courts of a country have now no jurisdiction to redress torts committed on the high seas against the property of its citizens by a cruiser of a friendly power, unless the cruiser was fitted out in violation of its neutrality laws. The injured neutral must resort to the courts of the captor for redress. *L'Invincible*, 1 *Wheaton's U. S. Supr. Ct. Rep.*, 238; *Moxon v. The Fanny*, 2 *Peters' Adm. Rep.*, 309.

But after the foreign prize court has adjudged the capture illegal, the neutral court may decree compensation in damages. *McGrath v. The Candelero*, *Bee's Adm. Rep.*, 60.

### *Trial of contraband persons.*

**901.** In the case of persons captured as contraband, proceedings may be taken by them or by the captors to have the legality of the capture judicially determined.

### *Uniform procedure.*

**902.** The nations uniting in this Code, shall take measures to adopt uniform rules for procedure in cases of prize.

## CHAPTER LXIX.

### EFFECT OF A STATE OF WAR ON OBLIGATIONS OF NATIONS AND THEIR MEMBERS.

ARTICLE 903. Existing obligations not in general affected.

904. Public debt not confiscable.

905. Treaties unaffected by war.

906. Effect of war on executory contracts.

907. Removal of interdiction.

908. Anticipation of war.

909. Extension of time.

910. Interest, damages, &c., for delay.

### *Existing obligations not in general affected.*

**903.** Neither a state of war, nor a treaty of peace, annuls existing rights or obligations, except so far as their existence is incompatible with it, or as is otherwise provided in this Book.

*Public debt not confiscable.*

**904.** War does not exonerate a belligerent from the obligation to pay its public debt, by whomsoever held,<sup>1</sup> nor does it suspend the payment of principal or interest, as it falls due.

<sup>1</sup> *Fioré, Nouveau Droit. Intern.*, v. 2, p. 313. This principle, says *Pradier Fodéré, (Id., note,)* is now adopted by modern governments. See instances of the honorable application of this principle in *Twiss, Law of Nations*, pt. II., pp. 110–114. By the treaty between the United States and Hayti, Nov. 3, 1864, Art. IV., 13 *U. S. Stat. at L.*, 711, it is provided, that neither the money, debts, shares in the public funds or in banks, or any other property of either party, shall ever in the event of war or national differences, be sequestered or confiscated.

And the treaty between France and Peru, March 9, 1861, 8 *De Clercq*, 197, provides, that neither debts due by individuals nor public stocks, nor shares in companies, &c., can be seized, sequestered or confiscated to the prejudice of the respective citizens and to the benefit of the country where they may be.

*Treaties unaffected by war.*

**905.** War does not affect the compacts of a nation, except when so provided in such compacts; and, except also that executory stipulations in a special compact between belligerents which by their nature are applicable only in time of peace, are suspended during the war.

*Halleck, (Intern. Law and Laws of War, 371,)* says: "A declaration of war does not *ipso facto* extinguish treaties between belligerent States. Treaties of friendship and alliance are necessarily annulled by a war between the contracting parties, except in respect to such stipulations as are made expressly with a view to rupture, such as limitations of the general rights of war, &c. So, of the treaties of commerce and navigation; they are generally either suspended or entirely extinguished by a war between the parties to such treaties. All stipulations with respect to the conduct of war, or with respect to the effect of hostilities upon the rights and property of citizens and subjects of the parties, are not impaired by supervening hostilities—this being the very contingency intended to be provided for,—but continue in full force until mutually agreed to be rescinded. There are many stipulations of treaties, which although perpetual in their character, are suspended by a declaration of war, and can only be carried into effect, on the return of peace."

*Kent, (Commentaries, v. I., p. 420,)* says: "As a general rule, the obligations of treaties are dissipated by hostilities. But, if a treaty con-

tain any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties of which the exercise is not necessarily suspended by the war, subsist in their full force."

As to the restoration of treaty obligations suspended by the war, see *Bluntschli, Droit Intern. Codifié*, § 718.

See also, Society for the Propagation of the Gospel v. New Haven, 8 *Wheaton's U. S. Supr. Ct. Rep.*, 464; the debate in the House of Commons, on the Declaration of Paris, of 1856; Speeches of Sir George Lewis and Mr. Bright, of March 11 and 17, 1862; and of the Earl of Derby, of Feb. 7, 1862; Dispatch of Mr. Marcy to Mr. Mason, of Dec. 8, 1856: *Philimore's International Law*, v. III., App. 21; *Dana's Wheaton, Elem. of Intern. Law*, note 143, p. 352.

### *Effect of war on executory contracts.*

**906.** All executory contracts, which directly subserve the purposes of war, and to which enemies, active or passive, are parties; and all executory contracts between any parties the execution of which would by reason of war involve a violation of any provision of this Book, are annulled, by the existence of war; saving the right of just compensation for any performance already had. The validity of other contracts is not affected by the existence of war.

But this article does not apply to international compacts.

In a recent case in the court of appeals of Virginia, (*Manhattan Life Ins. Co. v. Warwick, Insurance Law Journal*, vol. I., pp. 115, 126,) the distinction is stated thus: Where the contract is made before the war, but not executed by either party, and the carrying it into execution would involve a violation of the duties of the parties respectively to their country, in the new relation which the war has created; in that case its execution not having been entered upon, and it being uncertain how long the war may last and prevent the execution of the contract, it may be dissolved; and this not to the prejudice of the parties, or either of them, but for their presumed convenience and benefit to be absolved from the obligation of a contract, which, in the changed relations of their countries, can not be carried into execution. On the other hand, if the contract is partly executed, and rights under it have vested, and it can not be dissolved without the loss of forfeiture of one of the parties, and it can not be carried into execution consistently with the duty of the parties to their countries respectively, while the war lasts; in such case it should not be dissolved, but only suspended. But if it can be carried into

execution notwithstanding the war, without conflicting with the obligation of allegiance of either party, it will be neither dissolved nor suspended.

*Removal of interdiction.*

**907.** A contract, which is annulled by the last article, is not restored to validity by the return of peace.

*Esposito v. Bowden*, 4 *Ellis & Blackburn's Rep.*, 693.

*Anticipation of war.*

**908.** The anticipation, however well founded, of a war not declared or commenced, does not affect existing obligations.

*Pole v. Cetovich*, 9 *Common Bench Rep.*, N. S., 430.

*Extension of time.*

**909.** The time for performance of any act which is forbidden or prevented by war, in respect of which act time is of the essence of the obligation, except in the case of obligations annulled by article 906, is suspended until a reasonable period for performance after the interdiction or impediment is removed.

The authorities seem to agree that in case of *statutory* or *prescriptive* limitations, the period of war is to be deducted from the time limited. In respect to *conventional limitations*, such as those usual in insurance policies, &c., there is a difference of opinion whether, 1. The same rule should apply; or whether, 2. The intervention of war wholly annuls the conventional limitation; or whether, 3. The party should only be allowed a "reasonable time" after the removal of the disability. *Simmes v. City Fire Ins. Co.*, 6 *Blatchf.*, 455; *Apperson v. Bynum*, 5 *Coldwell's (Tennessee) Rep.*, 341.

When presentment of negotiable paper can not be made on account of the disturbed condition of the country, by civil or foreign war, presentment will be excused during the continuance of the obstacles, and for a reasonable time thereafter. *Polk v. Spinks*, 5 *Id.*, 431. In such case, the notice of protest to a party in the hostile country must be sent when the interruption of intercourse ceases. *Harden v. Brown*, 59 *Barbour's (New York) Rep.*, 425; citing *Edwards on Bills*, 458; *Hopkirk v. Page*, 2 *Brockenbrough's U. S. Circ. Ct. Rep.*, 20, 34.

*Interest, damages, &c., for delay.*

**910.** No interest, damage, or penalty is incurred, by reason of the non-performance of an obligation while its performance was rendered unlawful by war.

The rule, that interest is not recoverable on debts between alien enemies, for the time of the war, is only applied where the money was to be paid to an enemy directly. When the creditor, or an agent appointed to receive the debt, resides in the same jurisdiction as the debtor, interest continues. *Ward v. Smith*, 7 *Wallace's U. S. Supr. Ct. Rep.*, 453. This rule was held not to apply to a civil war, in *Shortridge v. Macon*, 1 *Abbott's United States Rep.*, 58; S. C., 1 *American Law Review*, 95.

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## CHAPTER LXX.

### EFFECT OF A STATE OF WAR UPON INTERCOURSE.

#### ARTICLE 911. Diplomatic intercourse.

- 912. Rights of public agents of neutral nation accredited to belligerent nation.
- 913. Interdiction of entrance of foreigners.
- 914. Interdiction of communication.
- 915. Mail service.
- 916. Foreigners' rights of residence and vocation.
- 917. Safe conducts.
- 918. Effect of safe conducts.
- 919. Passports.
- 920. Interdiction of interior traffic.
- 921. Intercourse across lines of military occupation.
- 922. Private ships surprised by war.
- 923. Voyages commenced.
- 924. Intercourse of active enemies.
- 925. Intercourse subserving the purpose of war.
- 926. Lawful intercourse.
- 927. Commencement and termination of illegality.
- 928. Transfer of ships during war.
- 929. Penalty of illegal traffic and intercourse.

#### *Diplomatic intercourse.*

**911.** During war, or at any time after the declaration thereof, a belligerent may expel any or all public agents appointed or accredited to it by the enemy. Diplomatic relations shall not entirely cease, but thereupon each belligerent shall designate the representative of some friendly nation, party to this Code, through

whom it may maintain communication with the other belligerent while the ordinary diplomatic relations are interrupted.<sup>1</sup>

See Article 93.

The law should authorize expulsion, not merely the deprivation of official power.

For an account of the humane labors of Mr. *Washburn* on behalf of the German population of Paris, see *Foreign Relations of the United States*, 1871, p. 266.

<sup>1</sup> The invoking of such friendly offices, which has already been done with the most advantageous results, now requires the consent of the belligerent, to which the representatives of friendly powers undertaking such offices are accredited. See *Foreign Relations of the United States*, 1870, p. 119, *et seq.* The adoption of the above Article would give neutral representatives a *right* thus to intervene. The present rule of the United States government requires the consent of both the nations concerned. *Foreign Relations of the United States*, 1871, p. 543.

*Rights of public agents of neutral nation accredited to belligerent nation.*

**912.** Public agents appointed or accredited by a neutral nation to a belligerent, have a right, notwithstanding the war, to go to and remain at their posts;<sup>1</sup> to send or receive their official dispatches under the official seal of themselves or their governments;<sup>2</sup> and to pass through the military lines of the hostile nation, together with their families, official and personal, when necessary for the purpose of reaching or removing from their respective posts.

<sup>1</sup> Letter of Mr. Fish, *Foreign Relations of the United States*, 1871, p. 401.

<sup>2</sup> In the Franco-Prussian war, during the siege of Paris, the official dispatches between the government of the United States and their legation in Paris, were transmitted to and fro, across the lines, by the belligerents, subject, however, to delay imposed by the military forces. Private correspondence and newspapers were also allowed transmission into Paris in the official dispatch bag, the former being examined to exclude everything relating to the war, and newspapers being passed on a pledge that they should only be read by the American minister. *Foreign Relations of the United States*, 1871, pp. 283-287.

The *right* of the neutral government to communicate with its representative in the besieged city, was not fully conceded by Count *Bismarck*

(*Id.*, pp. 291, 363,) although he was understood by the government of the United States to have conceded it. (*Id.*, p. 377.) But his refusal to recognize it was based partly on the plea that a fortified capital was unprecedented; (*Id.*, p. 372,) and partly upon the plea that the French Republic had not been recognized by the German powers. *Id.*, p. 365.

Perhaps the same right of communication with the hostile nation should be secured to those public agents who under the last Article may have undertaken to use their friendly offices in behalf of its members.

<sup>3</sup> See Letters of Count Bismarck, *Foreign Relations of the United States*, 1871, pp. 293, 373; Letter of Mr. Fish to Mr. Bancroft, *Id.*, p. 377.

### *Interdiction of entrance of foreigners.*

**913.** A belligerent may by interdiction render unlawful the entrance of passive<sup>1</sup> enemies into its territory; and may close any or all of its military ports, in the manner and to the extent provided in Chapter LXVII., entitled BLOCKADE.

<sup>1</sup> The entrance of active enemies is of course a lawful hostility.

### *Interdiction of communication.*

**914.** A belligerent may, in case of military necessity, suspend, wholly or in part, railway and telegraphic communication across its territorial boundaries.

### *Mail service.*

**915.** The mail service shall not be affected by war between the corresponding nations, until after one nation has received from the other a notification of its restriction or suspension of postal communication.<sup>1</sup> The mail service between a belligerent and a neutral nation shall not be affected by war.

<sup>1</sup> Postal convention between Great Britain and

France, Sept. 24, 1856, Art. XI., { *Accounts and Papers*, 1857, vol. XVIII., (11;) 7 *De Clercq*, 152.

Belgium, Oct. 19, 1844, " VIII., { *Accounts and Papers*, 1845, vol. LII.

These treaties also provide that upon a notification by one belligerent of the discontinuance of postal communications with another, the mail packets of the two countries shall be permitted to return freely and under special protection to their respective ports; which is sufficiently embraced in Articles 845, 922, and 923.



The postal convention between the United States and

Great Britain, Dec. 15, 1848, Art. XX., 9 *U. S. Stat. at L.*, (Tr.) 146.

Mexico, Dec. 11, 1861, " IX., 12 *Id.*, 1205,

each provide that the mail service shall continue until six weeks after a notification shall have been made of the discontinuance of postal communications.

And by the postal convention between the United States and

Bremen, March 28, 1864, 16 *U. S. Stat. at L.*, (Tr.) 177.

Hamburg, " " 16 *Id.*, (Tr.) 182,

it is provided that, whenever in consequence of war, or threatened war, the correspondence between the two nations can not be conveyed by steamers of either nation, it may be conveyed by steamers under neutral flags, subject to all the regulations contained in the postal conventions between the two nations.

### *Foreigners' rights of residence and vocation.*

**916.** Members of a belligerent nation and neutrals, who are within the territorial jurisdiction of the hostile nation at the declaration or commencement of war, may remain and continue their vocation therein, subject to the provisions of Book First of this Code,<sup>1</sup> so long as they continue wholly passive, and commit no offense against the provisions of this Code, or the laws of the place. But in case of a breach of such condition, they may be punished or sent out of the territory of the nation, or be required to remove to any designated place within it.<sup>2</sup>

<sup>1</sup> The provisions referred to make foreigners subject to the general laws of the country, (Articles 319, 328, 330, and 331,) and reserve the right of a nation to exclude them from offices, official trusts and particular vocations.

*Twiss*, (*Law of Nations*, Part II., p. 90,) urges a distinction between domiciled and transient alien enemies—a distinction once perhaps substantial, but now, with increasing rapidity of intercommunication, becoming every day less important. *Heffter* says, that a temporary detention of hostile subjects may be necessary to prevent them from communicating with their fellow countrymen, in respect to the plans of the belligerent. *Heffter*, § 126, 2, cited by *Twiss*, *Law of Nations*, Part II., p. 99.

*Vattel*, however, (*Droit des Gens*, liv. 3, ch. 4, § 63,) says, that the sovereign who declares war can not detain those subjects of the enemy who are within his dominions at the time of such declaration; and that they are to be allowed a reasonable time to withdraw, because, by per-

mitting them to enter his territories, he tacitly promised them protection, and security for their return.

The Article here proposed is drawn from the usual provisions in modern treaties, to the effect that at the time of war or interruption of friendly intercourse between the two nations, the members of either nation residing or established in trade or other employment within the territory of the other, who choose to remain, may do so, and carry on their business without interruption or demands, other than those imposed on native subjects, so long as they behave themselves peaceably and observe the laws.

Treaty between the United States and

- Nicaragua, June 21, 1867, Art. XI., 15 *U. S. Stat. at L. (Tr.)* 59.  
 Argentine Con- } July 27, 1853, " XII., 10 *Id.*, (Tr.), 237.  
 federation, }  
 Costa Rica, July 10, 1852, " XI., 10 *Id.*, (Tr.), 18.  
 Peru, July 26, 1851, " XXXII., 10 *Id.*, (Tr.), 28.  
 San Salvador, Jan. 2, 1850, " XXVII., 10 *Id.* (Tr.), 72.  
 The Two Sicilies, Oct 1, 1855, " I., 11 *Id.*, (Tr.), 639.

Treaty between Great Britain and

- Colombia, Feb. 16, 1866, *Accounts and Papers*, 1867, vol. 74.  
 Salvador, Oct. 24, 1862, *Id.*, 1863, vol. 75.  
 Nicaragua, Feb. 11, 1860, *Id.*, 1860, vol. 68.

Treaty between France and Peru, March 9, 1861, 8 *De Clercq*, 193

But if the conduct of the members of a belligerent nation within the territory of the other belligerent should render them justly suspected, they may be required to leave the country within a certain period, with their families, effects, and property, under a safe conduct to be furnished, or to remove forthwith to such places in the interior as may be designated.

Treaty between the United States and Peru, July 26, 1851, Art. XXXII., 10 *U. S. Stat. at L.*, (Tr.) 28. And see the treaty with Great Britain, Nov. 19, 1794, Art. XXVI., 8 *Id.*, 110. See also treaty between France and Peru, March 9, 1861, 8 *De Clercq*, 193.

By several of the above-mentioned treaties it is also provided that the citizens of either nation *residing* within the territory of the other at the commencement of war between the two nations, shall be allowed, within a certain time, (from six to twelve months,) to dispose of their property, or to transport it wherever they please, and under a safe conduct from the government to depart, with their money and effects, from the country.

And a similar provision was contained in the treaty of Utrecht, between Great Britain and Spain, Art. VI.; and in the treaty between Great Britain and Russia, of 1766, Art. XII., and of 1797, Art. XII.; also in the treaty between the United States and the

- Dominican } Feb. 8, 1867, Art. I., 15 *U. S. Stat. at L.*, (Tr.), 167.  
 Republic, }  
 Bolivia, May 13, 1858, " XXVIII., 12 *Id.*, 1003.

The right of foreigners to remove their property from the territory of a nation is provided for by Article 336.

By the treaty between the United States and

Bolivia, May 13, 1858, Art. XXVIII., 12 *U. S. Stat. at L. (Tr.)* 1003.

Guatemala, Mar. 3, 1849, " XXV., 10 *Id.*, (*Tr.*) 1.

San Salvador, Jan. 2, 1850, " XXVII., 10 *Id.*, (*Tr.*) 71,

the right of the members of either nation residing within the territory of the other, at the commencement of the war between the nations, to continue their residence and vocation, is secured only to persons of other occupation than that of *merchant*.

If it be thought desirable to reserve to a belligerent the right to send away passive enemies, the following provision may be sufficient: Members of one nation, being within the territory of another, who do not, before the expiration of six months after the commencement or declaration of war between the two, remove therefrom or become naturalized therein, and members of one of several belligerent nations, who come within the territory of the hostile nation to reside, with the knowledge of the existence of war between such nations, may be treated thereafter and during the war as enemies, active or passive, as the case may be, or be required forthwith to leave the country. *Grotius, de Jure Belli ac Pacis*, III., c. 2., § 7.

In the Franco-Prussian war, the French government first, in effect, forbade Germans capable of military service from leaving France without special leave, and subsequently commanded all Germans to leave.

### *Safe conducts.*

917. A belligerent must give safe conducts to the agents of international intercourse of neutral powers, who can not conveniently reach their destination without passing through its territory or military lines, and to persons sent out of its territory under article 911 or 916.

*Lieber's Instructions*, ¶ 87. See Article 137 and 138 of this Code.

### *Effect of safe conducts.*

918. A safe conduct, unless otherwise expressed, is subject to the following rules:

1. If giving license to go to a place, license to return is implied, in case that be a part of the purpose for which it was granted:

2. If giving license to leave a place, protection, dur-

ing the journey to cross the boundaries of the territory or military occupation, is implied ;

3. If granted to a particular person it is not transferable, and does not include his family, but includes necessary attendants and equipage, according to rank or position ;

4. If granted to a class, such as clergy or military persons, it includes all persons of the class of whatever degree, such as bishops, or commanders ;

5. It extends to all places on land or at sea within the territorial jurisdiction, or the range of hostilities of the belligerent granting it ; and,

6. It is not terminated by the death or removal of the person by whom it was granted.

These rules are suggested by *Grotius*, as quoted by *Wildman Intern. Law*, vol. 2, p. 29.

### *Passports.*

919. A belligerent may require passports from the members of other nations, whether belligerent or neutral, voluntarily seeking to enter or leave its territory or military lines.

### *Interdiction of interior traffic.*

920. A belligerent may, within its territorial limits, or within the district actually occupied by its armies, prohibit or otherwise restrict the exportation or transit of, or traffic in, anything needed for its own military purposes, or intended to promote the purposes of the enemy.

Other Articles declare the inviolability of private property ; but this Article secures the control necessary for military purposes ; so that all property may be taken and held on making compensation.

Ships of a neutral may as freely as in peace traffic to and fro between any unblockaded place in a belligerent's territory, and any other such place, or any place in neutral territory. Goods on board such ships, are free from capture, whatever may be their ownership, unless contraband, or the property of the hostile nation.

Treaty between France and Peru, March 9, 1861, Art. XX., 8 *De Clercq*, 200.

*Intercourse across lines of military occupation.*

**921.** All civil intercourse whatever, between the districts actually occupied by opposing belligerent armies is unlawful,<sup>1</sup> whether forbidden by proclamation or not;<sup>2</sup> except such as is expressly authorized by this Code,<sup>3</sup> or by agreement of the belligerent nations,<sup>4</sup> or by the military authority having command of the frontier.<sup>5</sup> But if the permission be given by one belligerent only, the intercourse is lawful as to him, but not as to the other.

*Bluntschli, Droit Intern. Codifié*, § 674; *Lieber's Instructions*, ¶ 86.

<sup>1</sup> *Hennan v. Gilman*, 20 *Louisiana Annual Rep.*, 241; see also *Graham v. Mervill*, 5 *Coldwell, (Tennessee,) Rep.*, 622; *Bank of Tennessee v. Woodson*, 5 *Id.*, 176.

The exception of contracts for ransom, which might be important if the prohibition of intercourse were extended beyond the lines of military occupation, need not be preserved, if the principles of the following Articles are adopted.

<sup>2</sup> A declaration of hostilities carries with it, according to the present rule, an interdiction of all commercial intercourse with the enemy, on the part of the subjects of the belligerent nation, without express license, *Lawrence's Wheaton, Elem. of Intern. Law*, pp. 544, 551, § 13; *Dana's Wheaton*, §§ 309, 315; *Barrick v. Buber*, 2 *Common Bench Rep. N. S.*, 563; *Esposito v. Bowden*, 7 *Ellis & Blackburn's Rep.*, 763; *Phillips v. Hatch*, 1 *Dillon's U. S. Circ. Ct. Rep.*, 191.

*Heffter*, (§§ 122, 123,) suggests, that a declaration of war does not of itself prohibit commercial intercourse, but that such intercourse may go on, unless specially prohibited, and so far as not so prohibited; which seems to be an opinion rather than a statement of law; for precedent and practice, and the opinions of jurists are the other way. *Dana's Wheaton*, note 158, p. 400.

<sup>3</sup> See, for instance, Articles 922 and 923.

<sup>4</sup> Under the existing rule, forbidding all trading with enemies, the license must be an express license granted or ratified by the highest authority in the government. *The Hope*, 1 *Dodson's Rep.*, 226. It must come ultimately from sovereign authority. *Halleck, Intern. Law and Laws of War*, 675-690; *Manning, Law of Nations*, § 123; *Wildman, Intern. Law*, II., 245-266; 1 *Kent's Commentaries*, 163; 1 *Duer on Insurance*, 594-619; *Hautefeuille*, tom. 1, p. 19; *Woolsey's Intern. Law*, § 147; *Phillimore's Intern. Law*, III., 249, 613.

<sup>5</sup> A license to trade with the enemy must be issued by competent authority without material misrepresentation, whether intentional or not, on the part of the receiver, and must be used in good faith, strictly according to its terms. *Dana's Wheaton*, note 198, p. 504. See also *Leevin*

v. Cormac, 4 *Taunton's Rep.*, 483, n.; Freise v. Thompson, 1 *Id.*, 121; Van Dyck v. Whitmore, 1 *East Rep.*, 475.

By the rules hitherto in force, it is cause of capture for a private ship of one belligerent to sail under a special license or safe conduct of the other, even where the voyage is to a neutral port, and there is no direct communication with the enemy in the whole course of the voyage. Thus in the war between Great Britain and the United States, in 1812, the former power being also with its allies, at war in Spain and Portugal, sold licenses to American vessels to trade between America and Spain or Portugal, in order to favor the forwarding thither of supplies for the allied armies. But American vessels trading under such licenses were held lawful prize by American cruisers. The *Julia*, 8 *Cranch's U. S. Supr. Ct. Rep.*, p. 181, and cases following, pp. 203, 444. So, too, the illegality of sailing under an enemy's license is held proper cause for the forfeiture of a neutral vessel. The *Alliance*, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*,) p. 262.

It is competent for the government to permit commercial intercourse, in so far, at least, that transactions had pursuant to such permission are held valid in the courts of such government. *Woods v. Wilder*, 43 *New York Rep.*, 164.

In the Crimean war, the British government resolved to issue no licenses, but to allow trade to be carried on with the enemy, even by British subjects, provided it was carried on in neutral ships. "The example," says *Lushington's Naval Prize Law*, Intro., p. xi., "will in all probability be followed in future."

In the war of France and Great Britain against China, the French government allowed French and English subjects to continue their commercial intercourse with the Chinese, even on Chinese soil, and reciprocally the Chinese to continue such intercourse with French and English, even on French or English soil. 8 *De Clercq*, 353.

It has been claimed in England, and as strongly denied in the United States, that a country which, during peace, confines the trade of its colonies to its own subjects, can not, during war, open such trade to a neutral. See Mr. Justice DUER's essay on this subject, 1 *Duer on Insurance*, 698-725. For the English rule, see *The Emmanuel*, 1 *Robinson's Adm. Rep.*, 296; *The Providentia*, 2 *Id.*, 142; *The Ebenezer*, 6 *Id.*, 250; *The Thomyris*, *Edw.*, 17. In support of the American rule, see Mr. MONROE's letter to Lord MULGRAVE, Sept. 23, 1805; Mr. MADISON's letter to Messrs. MONROE and PICKNEY, May 17, 1806; and the memorials of the merchants of Baltimore, New York, Boston and Salem, 5 *American State Papers*, 330-335, 367-379; 2 *Parsons on Contracts*, 398.

The liability of neutral ships to detention, for carrying on the coasting trade of the enemy, "may be taken to have been silently repealed," says *Lushington*, writing of the English rule, "by the advance of free trade." See also the provisions of BOOK FIRST in respect to equality of commercial privileges.

*Private ships surprised by war.*

**922.** Subject to articles 863 and 920, concerning contraband and the prohibition of exports, private ships bearing the national character of a belligerent, being, at the commencement of hostilities or the declaration of war, in ports where they would be subject to detention or confiscation under articles 921 and 929, or lawfully coming there<sup>1</sup> afterwards, are free from capture and detention, and may discharge cargo; and may take in any cargo already engaged, and depart within thirty days<sup>2</sup> after the declaration of war or the commencement of hostilities. In case of a ship coming into port after such time the intervening period is not to be computed.

This seems a reasonable extension of the rule contended for by *Vattel*, (*Droit des Gens*, L. III., c. 4, § 63,) and approved by *Twiss*, (*Law of Nations*, Part II., p. 101, § 54, opposing in this the harsh doctrine of *Story*, J.). Modern usages sanction the principle that the belligerent can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration, because they came into them upon the public faith. The above Article is of course so stated as to constitute an exception to the interdiction of intercourse with ports within the military occupation. Other ports would, by Article 891, be open during war.

<sup>1</sup> See Articles 913 and 915.

<sup>2</sup> In the Franco-Prussian war, 1870-1, the German notification allowed six weeks; the French, thirty days.

On the commencement of the Crimean war, each belligerent allowed the enemy's merchant vessels within its ports, &c., a reasonable time to load and depart; (six weeks were allowed by Great Britain) and those which had sailed bound to such ports were allowed to enter, discharge, and depart. "This," says *Twiss*, (*Law of Nations*, Part II., p. 117,) "marks an epoch in the practice of nations in the exercise of belligerent rights at the immediate outbreak of war." He suggests, however, that the precedent, since it arose in the case of a war commenced for the protection of an ally, does not apply to cases of denial of redress for injuries received, and in which the property of members of one nation is liable to be confiscated for indemnity. Later precedents do not sustain this qualification.

*Voyages commenced.*

**923.** Subject to articles 863 and 920, concerning contraband and the prohibition of exports, private

ships bearing the national character of a belligerent, bound to a port of a hostile nation, in which they would be subject to confiscation or detention under articles 921 and 929, and leaving the last port before notice of the declaration of war or commencement of hostilities, or driven to the hostile port at any time in distress, may freely enter such port, and enjoy the same immunity as is provided in the last article.

*Intercourse of active enemies.*

**924.** Active enemies can not make contracts or engage in commerce or traffic with enemies, either active or passive, or with the hostile government, except as expressly sanctioned by this Code,<sup>1</sup> or by both of their respective governments.

<sup>1</sup> See Chapters LX. and LXIII., and Part IX.

The doctrine, that a declaration or recognition of war effects an absolute interruption and interdiction of all commercial intercourse and dealings between the subjects of the two countries, does not apply to "contracts of necessity, founded on a state of war, and engendered by its violence;" *e. g.*, ransom bills, and bills of exchange drawn by a prisoner in the enemy's country for his own subsistence. *Halleck, Intern. Law and Laws of War*, p. 359, § 11.

*Intercourse subserving the purpose of the war.*

**925.** Enemies, whether active or passive, can not make contracts or engage in commerce or traffic with each other, or with each other's government, which may directly subserve the purposes of war.

The rule prescribed by this Article is suggested as the principal restriction which war ought to impose upon neutrals and non-combatants. See note to the next Article.

*Lawful intercourse.*

**926.** Subject to the provisions of this Book, passive enemies may make any contracts, and engage in any commerce or traffic with any persons or nations, except their active enemies, and the hostile nation, which will not directly subserve the purposes of war.

The existing rules may be briefly indicated as follows :



The existence of war renders unlawful all commercial intercourse or correspondence of members and domiciled residents of one country with those of the other.

Trading by one enemy with the other subjects the property to confiscation or to capture and condemnation.

Partnerships between enemies are dissolved.

No valid contract, express or implied, can arise from any transaction between enemies. Executory contracts which can not be performed without commercial intercourse with the enemy are dissolved. 6 *Wallace's U. S. Supr. Ct. Rep.*, 535, and authorities there cited.

The rule forbidding trade between enemies has been applied to the full extent of the old principle, (now generally disavowed,) that, war makes all individual subjects of the nations concerned, the individual enemies of each other; and all intercourse between them, therefore, unless by consent of the sovereign, illegal, except contact in actual combat. The object, policy, and spirit of the rule, says Chief Justice MARSHALL, (in the case of *The Rapid*, 8 *Cranch's U. S. Supr. Ct. Rep.*, 162,) "is to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation or contract has, therefore, no necessary connection with the offense. Intercourse inconsistent with actual hostility, is the offense against which the operation of the rule is directed." In this case, an American citizen during peace bought English goods in England, and deposited them on Indian Island, a small island belonging to England, near the boundary between Nova Scotia and the United States. On the breaking out of war between Great Britain and the United States, he sent a fishing vessel to bring the goods away. This was held unlawful.

An English case, *The Madonna Della Gracia*, (4 *Robinson's Rep.*, 195,) has asserted a distinction in the case of property not bought in the way of trade; but as is pointed out by Mr. *Castle*, (*Law of Commerce in Time of War*, p. 24,) if we come to qualify this doctrine by the principle laid down by Mr. Justice WILLES, in *Exposito v. Bowden*, (9 *Ellis & Blackburn's Rep.*, 788,) that mere payment of export and custom house dues is a sufficient dealing with the enemy to render the contract illegal; the English rule of law can not be said to be more lenient, or to differ much from that of the American,—that is to say, all intercourse with the enemy, inconsistent with actual hostility,—is illegal. STORY, J., in laying down the rule, in the case of *The Julia*, (8 *Cranch's U. S. Supr. Ct. Rep.*, 194,) says, that every aid by personal communication or by other intercourse, which shall take off the pressure of the war, or foster the resources or increase the comforts of the public enemy, is strictly inhibited. All intercourse which humanity or necessity does not require, is prohibited. Chancellor KENT, in *Griswold v. Waddington*, 16 *Johnson's (New York) Rep.*, 438, reviewed the continental, the English and the American authorities, and concluded that the rule of interdiction implied in a state of war "reaches to all interchange, or transfer, or removal of property, to all negotiation of contracts, to all communication, to all locomotive inter-

course, to a state of utter occlusion, to any intercourse but one of open hostility, to any meeting but in actual combat."

A leading case in England is that of *The Hoop*, (1 *Robinson's Rep.*, 196,) in which Sir WM. SCOTT reviewed the authorities, and concluded that intercourse could not subsist on any other footing than that of the direct permission of the State. "There is no such thing," said Sir JOHN NICHOLL, (the King's Advocate in *Potts v. Bell*, 8 *Durnford & East's Rep.*, 548, 554,) "as a war for arms, and a peace for commerce."

The rule that war dissolves commercial partnerships was even applied to the case of a firm, two members of which resided in the North, and one in the South, at the breaking out of the civil war in the United States, and the court refused to consider the allegiance or disposition of the latter. *Wood v. Wilder*, 43 *New York Rep.*, 164.

The prohibition extends to the mere carrying of messengers and dispatches. *The Tulip*, 3 *Washington's U. S. Circ. Ct. Rep.*, 181.

*Dana* thus reviews the subject: During the Crimean war, the rule of non-intercourse with the enemy was greatly relaxed by the belligerents; but it was done by orders and proclamations in advance, professedly relaxing a rule which otherwise the courts of prize would have been obliged to apply. The Order in Council, of 15th April, 1854, permitted British subjects to trade freely at Russian ports not blockaded, in neutral vessels, and in articles not contraband, but not in British vessels. (*London Gazette*, April 18, 1854.) The French orders were to the same effect. The Russian Declaration of 19th April, permitted French and English goods, the property of French or English citizens, to be imported into Russia in neutral vessels. (*London Gazette*, May 2, 1854.) The French and Russian governments allowed private communications, not contraband in their nature, to be exchanged between their subjects by telegraph. (*Courier des Etats Unis*, 23d July, 1855.) The subject is not touched by the Declaration of Paris of 1856. The Orders in Council must therefore be considered as a special relaxation, adopted from reasons of policy applicable to that war, and as to which each nation must judge for itself as to any future war. In the debates in Parliament, and in speeches made by public men in the commercial cities, as well as in the memorials of merchants, and in contributions to the press, during and soon after the Crimean war, there was a strong disposition evinced to have all trade left free, and to confine the operations of wars to government property and persons or vessels in public belligerent employment. *Dana's Wheaton, Elements of Intern. Law*, note 158, p. 400.

See the English authorities on National Character, as related to the question of belligerent rights, collected in 2 *Wildman's International Law*, p. 36-117; *Castle's Law of Commerce in Time of War*, pp. 27-39; and the same subject with the American authorities in *Lawrence's Wheaton, Elem. of Intern. Law*, pp. 557-580, §§ 16-22; *Dana's Wheaton*, §§ 318-340.

### *Commencement and termination of illegality.*

927. The commencement, by an enemy or neutral,

of a voyage to, or other effort at intercourse with, a belligerent place, with knowledge of the war, and in the execution of a purpose to carry on unlawful traffic or intercourse, is unlawful; but a voyage or other effort at intercourse commenced without such knowledge or purpose, is not rendered unlawful by the subsequent commencement of hostilities,<sup>1</sup> unless thereafter persisted in. And, when the military occupation or interdiction, which renders traffic with a place illegal, ceases, the right to capture property engaged in such traffic ceases at the same time.<sup>2</sup>

<sup>1</sup> 2 *Wildman's International Law*, p. 23.

<sup>2</sup> 5 *Robinson's Rep.*, 251.

### *Transfer of ships during war.*

**928.** An actual and unconditional transfer of a private ship of one belligerent to another, or a neutral, if in accordance with article 275, is valid and effectual to change the national character.

The rule established by the courts is, that a transfer of property to a neutral by an enemy, in time of war, or in aid of a contemplated war, is illegal, as in violation and fraud of vested belligerent rights. The *Bernon*, 1 *Ch. Robinson's Rep.*, 102; The *Noydt Gedacht*, 2 *Id.*, 137, note; The *Minerva*, 6 *Id.*, 396, 400, note; The *Rosalie and Betty*, 2 *Id.*, 343; The *Mercy*, *Blatchford's Prize Cases*, (*U. S. Dist. Ct.*) p. 187; The *Georgia*, 7 *Wallace's U. S. Supr. Ct. Rep.*, 32.

The principal rules as to the national character of property, during war, as laid down by the judicial authorities, are as follows:

1. *Ships.* A ship, freely navigating solely under the flag or pass of any other nation than that of its owner, bears the national character of such other nation. 1 *Kent's Commentaries*, 85. A foreign flag may be hoisted under the regulations of a particular trade. *Arnold v. Delcoli*, *Bee's Adm. (U. S.) Rep.*, 5.

The presumption of national character arising from these emblems of nationality may be rebutted by the presence of other instruments found in the possession of the captain. *Gouget et Merger*, III., p. 260, § 45.

As to national character of shipping, see *Lawrence's Wheaton, Elem. of Intern. Law*, p. 580, § 22; *Dana's Wheaton*, § 340; The *Julia*, 8 *Cranch's U. S. Supr. Ct. Rep.*, 181; The *Hiram*, 8 *Id.*, 404; The *Aurora*, 8 *Id.* 203.

2. *Establishments of trade.* The ownership of, or interest in, a com-

mercial establishment, and its branches, bears the national character of the nation within whose limits the chief establishment is situated. *Lawrence's Wheaton, Elements of Intern. Law*, p. 573, § 19; The Freundschaft, 4 *Wheaton's U. S. Supr. Ct. Rep.*, 105.

The British and American courts make a further exception in the case of an owner domiciled in a hostile country, and owning a share in a house of trade established in a neutral country, (*Lawrence's Wheaton, Elem. of Intern. Law*, p. 575, § 20;) an exception which shows "strong marks of partiality towards the interests of captors."

3. *Products of the soil.* The national character of the products of the soil of the territory of a nation is that of the territory, so long as they belong to the owner of the soil. *Lawrence's Wheaton, Elem. of Intern. Law*, p. 576, § 21.

### *Penalty of illegal traffic and intercourse.*

**929.** Property which is made the subject or vehicle of traffic that is illegal, under the provisions of this Book, is liable to capture and confiscation; and persons engaged in intercourse that is illegal, under the provisions of this Book, are liable to capture and detention, in the manner provided in this Book.

See Chapters LXIII. and LXVI.

The rules for ascertaining the destination of a voyage, (as distinguished, however, from the destined use of a ship or cargo,) are prescribed by Articles 855-858.

## CHAPTER LXI.

### EFFECT OF A STATE OF WAR UPON THE ADMINISTRATION OF JUSTICE.

Both the English and American courts refuse, in general, to sustain any action during war, either by or in favor of an alien enemy. *Brandon v. Nesbitt*, 6 *Term. Rep.*, 23; *Mumford v. Mumford*, 1 *Gallison's U. S. Circ. Ct. Rep.*, 366. After peace is restored between the nations, the members of each may sue in the courts of the other, even upon contracts made during the war; (*Antoine v. Morshead*, 1 *Marsh.*, 588; 6 *Taunton's Rep.*, 237; and see *Sparenburgh v. Bannatyne*, 1 *Bosanquet & Puller's Rep.*, 163; 2 *Espinasse's Rep.*, 580;) though a contrary rule was recognized in the case of *Anthon v. Fisher*, 2 *Douglass' Rep.*, 649, n. It is, however, admitted that an alien enemy may sue, if he come under circumstances that put him in the Sovereign's Peace *pro hac vice*,—e. g., a pass, cartel, or flag of truce. *Twiss Law of Nations*, Part II., p. 109. And since, ac-

According to Article 750, passive enemies are treated as to a certain extent in a condition of peace; a condition which it is one of the purposes of this Book to maintain for non-combatants during war, it should seem proper to allow them, as a general rule, to sue in the courts of any nation.

Thus, no restriction on the resort to civil justice is contained in this Book, except such as is implied in the power of a belligerent to interdict the presence of foreigners. See Article 913.

In *Juando v. Taylor*, (2 *Paine's U. S. Circ. Ct. Rep.*, 652,) it was held, that no suit or proceeding could be maintained in the courts of a neutral nation by the subjects of one belligerent against the subjects of another, for acts growing out of the war.

ARTICLE 930. Suspension of remedies.

931. Private rights protected.

932. No civil remedy against lawful hostilities

933. Prescriptions and statutes of limitations.

934. The same; in case of civil war.

935. Failure to protect foreigners.

### *Suspension of remedies.*

**930.** A belligerent may suspend, during the war, the right of enemies, whether active or passive, to resort to its civil courts for judicial remedies, except in cases of prize.

The general principle, that peaceful commerce, subject to the restrictions defined by this Code, is lawful, requires the continuance of judicial remedies, subject of course to a power of suspension, which will provide for all the exceptions to the freedom of intercourse.

According to the recent case of *Zacharie v. Godfrey*, (50 *Illinois Rep.*, 186,) the question whether an alien enemy should be excluded from the courts of a nation, depends on the consideration of his actual residence during the war in the hostile country, and the probable effect of a recovery, to place the money recovered within reach of the enemy, rather than of his citizenship in the hostile nation.

The disability is a suspension of the remedy, not an extinguishment of the right of action.

### *Private rights protected.*

**931.** Subject to the last and the next two articles, a belligerent is bound to recognize and protect the private rights of passive enemies and neutrals, both in respect of person and property; and, except when the courts are open and can afford adequate redress, to punish offenses against the same, by military authority.

*Leiber's Instructions*, ¶ 37; *Hanger v. Abbott*, 6 *Wallace's U. S. Supr. Ct. Rep.*, 532; *Elzee v. Lovell*, 1 *Woolworth's U. S. Circ. Ct. Rep.*, 102, 110.

The principle, that an alien enemy has no standing in court, and can not appear and defend his property, seized as a prize of war on the high-seas, does not apply to a claimant in the admiralty. An alien enemy may appear as claimant of his property, libeled for condemnation as forfeited. *United States v. Shares of Stock*, 5 *Blatchford's U. S. Circ. Ct. Rep.*, 231.

*No civil remedy against lawful hostilities.*

**932.** Acts done by the military power, if within the scope of military operations, as defined by this Book, are not the subjects of civil remedies against individuals, except in the cases herein provided.

Compare Articles 721, 722, 723, 887 and 888.

An action does not lie in the courts of one nation for acts done by the military forces of another nation, while the two were at war. The remedy is by application to the government. But this rule does not apply to a civil or domestic war.

A number of American authorities, in cases arising in the late civil war, held that an act which is a violation of the laws of war, such as burning a court-house, appropriation of private property, &c., is not justified by the command of a superior officer. *Christian County Court v. Rankin*, 2 *Duwall*, 502; *Yost v. Stout*, 4 *Coldwell, (Tennessee,) Rep.*, 205; *Witherspoon v. Woody*, 4 *Id.*, 605; *Terrill v. Rankin*, 2 *Bush Rep.*, 453.

*Prescriptions and statutes of limitations.*

**933.** The declaration or existence of war between nations prevents the operation of the rules of prescription, and the running of the statutes of limitations,<sup>1</sup> of each nation, as against members and domiciled residents of the other, from the declaration, or the first act of hostility, whichever may be the earlier, to the final ratification of the treaty of peace,<sup>2</sup> excepting such time as the parties were permitted to remain in the country and the courts were open to them.<sup>3</sup>

*Jackson Ins. Co. v. Stewart*, 6 *American Law Reg. N. S.*, 732.

<sup>1</sup> Perhaps conventional limitations of actions, like those common in insurance policies, should be included with statutes of limitations in the above article. If they are not so included, the effect of Article 909

will be to allow a reasonable time only after the removal of the obstacle.

<sup>2</sup> *Ogden v. Blackledge*, 2 *Cranch's U. S. Supr. Ct. Rep.*, 272; *Hanger v. Abbott*, 6 *Wallace's U. S. Supr. Ct. Rep.*, 540; 2 *Wildman's International Law*, 17.

<sup>3</sup> Under the rule proposed in Article 930, this exception seems proper.

*The same ; in case of civil war.*

**934.** The existence of civil war in a nation prevents the operation of its rules of prescription and the running of its statutes of limitation,<sup>1</sup> as against members and domiciled residents of other nations, in those cases in which the issuing or the effectual service of process could not have been had, by reason of the interruption of the course of justice.

Act of Congress of United States, of June 11, 1864, 13 *U. S. Stat. at L.*, 123. See *Whitfield v. Allison*, 1 *American Law Review*, 188.

<sup>1</sup> See note to last Article.

*Failure to protect foreigners.*

**935.** A belligerent is not liable to foreigners for injuries or losses caused by the enemy.

The rule of international law is well settled that a foreigner, who resides in the country of a belligerent, can claim no indemnity for losses of property, occasioned by acts of war of the other belligerent. Opinion of U. S. Attorney-General in case of the Bombardment of Valparaiso, 12 *U. S. Attorneys-General Opinions*, 21; and letter of Secretary Marcy, in the Greytown case, there quoted.

## PART IX.

## THE TERMINATION OF WAR.

Many of the questions discussed in the books, bearing on this subject, are, in modern usage, settled by treaties of peace ; and it seems therefore unnecessary to prescribe in great detail, by an International Code, the principles which would regulate a peace made without treaty.

ARTICLE 936. War, how terminated.

937. Effect of peace.

938. Definition of " completed conquest."

939, 940. National character and allegiance of conquered nation.

941. Effect of completed conquest as to persons and property.

942. Effect of overthrow of insurrection.

943. Duress of negotiators.

944. Effect of treaty of peace.

945. Extent of responsibility.

946. Rescission of treaty.

*War, how terminated.*

936. War may be terminated by a complete conquest, or by a cessation of hostilities, and the resumption of peaceful intercourse between the belligerents, with or without a treaty of peace, or other compact.

*Halleck's Intern. Law and Laws of War*, p. 845.

Where no treaty of peace is made, the date of the resumption of intercourse may, perhaps, be a convenient rule to fix the termination of the war. See *Bluntschli, Droit Intern. Codifié*, § 700.

The time of a treaty taking effect is provided for by Articles 196 and 197.

*Effect of peace.*

937. Upon the termination of war, unless otherwise provided by compact :

1. Each belligerent is entitled to all movable public property of the other of which he has lawfully acquired possession by the war,<sup>1</sup> except such as is ex-



empted by article 840, subject, however, in case of conquest of territory, to the rules prescribed by Chapter III. of this Code ;

2. All hostilities, except the detention of movable property previously<sup>2</sup> captured, and all constraint.<sup>3</sup> of persons taken prisoners of war, except such as is necessary to preserve order;<sup>4</sup> must cease ;

3. All occupation of hostile territory not the subject of complete conquest, must cease as soon as practicable ;<sup>5</sup>

4. All belligerent rights not reserved by this Code, except those necessary to the preservation of order, and to the adjudication upon the title to property captured, cease ;<sup>6</sup> and,

5. Treaties and other obligations between the belligerents, which were suspended by the war, are revived, except so far as they may be incompatible with the altered state of things.<sup>7</sup>

<sup>1</sup> See Article 938 of this Code ; and *Bluntschli, Droit. Intern. Codifié*, § 715.

Perhaps the principle that all public movable property of the hostile nation, other than military treasure and contraband of war, seized and appropriated by the belligerent nation to its own use, should be considered compensation for the cause of the war, ought to be embodied as a positive regulation ; though this is rather a matter of agreement than a right of the conquered nation.

<sup>2</sup> The rights of war exist only while the war continues. If peace be concluded, a capture made immediately afterwards on the ocean, even where peace could not have been known, is unauthorized, and property so taken is not prize of war, and must be restored. See *Lawrence's Wheaton, Elem. of Intern. Law*, p. 884, § 5 ; *Dana's Wheaton*, § 547.

<sup>3</sup> *Twiss, Law of Nations*, pt. II., 353, § 178 ; *Phillimore's Intern. Law*, vol. III., p. 145.

In the case of Preston, the Attorney-General of the United States gave his opinion that the cessation of the war of the rebellion, and the peace proclamation of the President relieved from parol and from military jurisdiction, rebel officers who had surrendered and had been discharged upon parole. 12 *Opinions of the U. S. Attorneys-General*, 120.

<sup>4</sup> *Bluntschli, Droit Intern. Codifié*, § 716.

<sup>5</sup> By the old doctrine of *uti possidetis*, in the absence of any compact, each belligerent is entitled to the sovereignty of the territory and the ownership of all public property of the hostile nation of which he has

military occupation at the termination of the war; but it should seem just to restrict this right within narrower limits. The subject is almost always regulated by a treaty of peace; and in the rare cases in which this may be omitted, it will be sufficient to provide for the right of the conqueror to movables in possession, and to territory of which he has achieved complete conquest, and the public property therein.

<sup>6</sup> Such for instance are the levying of forced loans, &c., or collecting those previously levied. *Halleck, Intern. Law and Laws of War*, p. 860.

<sup>7</sup> *Kent's Commentaries*, vol. 1., p. 177; *Halleck's Intern. Law and Laws of War*, p. 862.

*Definition of "completed conquest."*

**938.** Where the authority of one belligerent nation over any territory of the other, has become permanently established, either by cession, or by acquiescence, the conquest is deemed completed,<sup>1</sup> from the time the conqueror unequivocally manifests his ability and intention to retain such territory as his own, under civil government, and in a state of peace. Until that time it is deemed to be held by military occupation<sup>2</sup> only."

<sup>1</sup> *Dana's Wheaton, Elem. of Intern. Law*, note 169, p. 434.

<sup>2</sup> See Chapter LVI., concerning MILITARY OCCUPATION.

<sup>3</sup> *Halleck, Intern. Law and Laws of War*, pp. 811-814.

*National character and allegiance of members of conquered nation.*

**939.** In case of the completed conquest of a nation, its members become members of the conquering nation.

The national character thus acquired may, of course, be changed by naturalization; and meanwhile the duty of allegiance may be extinguished by subsequent, or even previous, removal from the territory, coupled with the intent to become naturalized elsewhere. See Articles 261-265.

By the provisions of the BOOK ON PEACE, allegiance follows national character, subject to the right of expatriation.

*The same.*

**940.** In case of the completed conquest of part of the territory of a nation, if not otherwise provided by special compact, its members, domiciled within such

territory, become members of the conquering nation, unless within six months after the completion of the conquest they exercise the right of expatriation, defined by articles 264 and 265; in which case they are deemed to have retained their former national character and allegiance.

See *Halleck, Intern. Law and Laws of War*, pp. 816-820.

Immediately after the surrender of Paris and the cession of Alsace and Lorraine to Germany, and before the treaty of peace was ratified, Mr. Washburne gave certificates of German nationality to citizens of those provinces who desired to leave Paris in consequence of the French conscription. *Foreign Relations of the United States*, 1871, pp. 329, 344.

*Effect of completed conquest as to persons and property.*

**941.** In the case of a completed conquest, if not otherwise provided by compact:

1. The conquering nation may regulate the political and civil rights of those who thereby become members of it;<sup>1</sup>

2. The conquering nation must respect the private rights, and titles to property, of persons within the territory, and by proper laws and regulations insure to them the means of enjoying those rights; and, until otherwise declared, all laws of the former government regulating the private relations of persons, and of corporations both private and municipal, to each other, and their private rights of property remain in force, so far as they are not inconsistent with the organic law of the conquering nation;<sup>2</sup> and,

3. Subject to the provisions of Chapter III. of this Code, entitled "PERPETUITY OF NATIONS," the conquering nation succeeds to the title of all public property and rights of the enemy within the conquered territory;<sup>3</sup> and may make valid transfers or releases of such property and rights.\*

<sup>1</sup> *Dana's Wheaton, Elem. of Intern. Law*, note 169, p. 434; *Halleck, Intern. Law and Laws of War*, p. 822.

<sup>2</sup> *Dana's Wheaton*, note 169, p. 434; *Halleck, Intern. Law*, pp. 830-838.

<sup>3</sup> *Dana's Wheaton*, note 169, p. 434; *Halleck, Intern. Law*, pp. 839-843.

<sup>4</sup> This will include the discharge of debts and other property in action.

*Effect of overthrow of insurrection.*

942. A nation, whose authority is re-established, after having been temporarily displaced from a part of its territory by an insurrectionary government, succeeds to all the rights and property of the usurping government.<sup>1</sup> All claims against such usurping government, in favor of others than the nation, are staked on the success of the insurrection, and are of no validity after its overthrow.<sup>2</sup>

<sup>1</sup> *United States of America v. Prioleau*, 11 *Jurist, N. S.*, 792; 35 *Law Journ. Ch.*, 7; 13 *Weekly Rep.*, 1062; 13 *Law Times Rep., N. S.*, 92; *United States of America v. McRae*, *Law Rep.*, 8 *Eq. Cas.*, 69.

<sup>2</sup> In the case of the *United States of America v. McRae*, (above mentioned,) it was held that with respect to property which has been voluntarily contributed to the insurrectionary government, or acquired by it, in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate government is not, on its restoration, entitled to it by title paramount, but as successor only (and to that extent recognizing the authority) of the displaced usurping government, and in seeking to recover such property from an agent of the displaced government, can only do so to the same extent and subject to the same rights and obligations as if that government had not been displaced, and was itself proceeding against the agent.

The true principle, however, seems to be that stated in the foregoing Article.

*Duress of negotiators.*

943. Duress of the person of those concerned in the negotiation of a treaty of peace, renders the compact void as against the power they represent.

*Bluntschli, Droit Intern. Codifié*, § 704; compare, however, *Halleck, Intern. Law & Laws of War*, p. 847.

*Effect of treaty of peace.*

944. When a treaty of peace is made, all grievances existing and known prior to the termination of the war, are to be deemed satisfied by the treaty unless excepted thereby; <sup>1</sup> and the treaty is to be first resorted

to, as furnishing the rules by which the results of the war are to be measured.

<sup>1</sup> See *Bluntschli, Droit Intern. Codifié*, § 714. On the contrary, *Lawrence's Wheaton, (Elements of Intern. Law, p. 876, § 3 ;)* and *Halleck, (Intern. Law and Laws of War, p. 853,)* hold that claims for injuries committed prior to the war, which form no part of the reasons for undertaking it, are not extinguished.

### *Extent of responsibility.*

945. No hostilities between belligerents committed during war, in obedience to the commands of lawful superiors, by persons impressed with the military character, and no lawful hostilities committed by any other person, subject such persons to civil or criminal liability after the termination of the war.<sup>1</sup> Nor shall any such acts, committed after the termination of the war, subject the person to criminal liability, if committed in good faith, without actual knowledge of its termination.<sup>2</sup>

<sup>1</sup> *Bluntschli, Droit International Codifié*, §§ 710-713.

This rule is somewhat more restricted than that laid down in the books, (see *Halleck, Intern. Law and Laws of War, p. 851*, and authorities cited ;) but as between nations uniting in the Code, a criminal violation of the laws of war should not be tacitly merged by peace. Any further responsibility than that defined in the above Article ought to be accorded only by special compact, or decree.

<sup>2</sup> As to the conflict of opinion in reference to civil liability for acts done innocently after the termination of the war, see *Halleck, Intern. Law and Laws of War, p. 857*.

The rule that a treaty is binding from signature or ratification is embodied in Articles 196 and 197.

### *Rescission of treaty.*

946. A violation of executory provisions in a treaty of peace, affecting the re-establishment of a peaceful condition, entitles the aggrieved party wholly to rescind the treaty,<sup>1</sup> and continue the war.<sup>2</sup>

<sup>1</sup> See *Halleck, Intern. Law and Laws of War, pp. 862-864*.

<sup>2</sup> This does not require a new declaration of war. *Bluntschli, Droit Intern. Codifié*, § 723.



# DIVISION FOURTH.

## ALLIES.\*

**ARTICLE 947.** Who are allies.

948. The obligation of allies.

949. Permission of intercourse must be joint.

950. Separate compacts not binding.

951. Prize courts.

*Who are allies.*

**947.** Allies are nations bound by treaty to assist each other, in some manner, by belligerent operations.

As to the furnishing of subsidiary troops being considered as a belligerent act, and a breach of neutrality, see Division V., entitled **NEUTRALS**.

*The obligation of allies.*

**948.** Unless otherwise provided by a treaty of alliance, one ally may judge for itself whether the other has a just cause of war, and may act accordingly.

*Woolsey's International Law*, § 111.

*Permission of intercourse must be joint.*

**949.** During a conjoint war, intercourse with the enemy, which is unlawful without the permission of a belligerent, must have the permission of all ;<sup>1</sup> unless it appear that it could in no manner interfere with their common operations.<sup>2</sup>

<sup>1</sup> The *Nayade*, 4 *Robinson's Adm. Rep.*, 251 ; 2 *Wildman's International Law*, p. 21 ; 1 *Kent's Commentaries*, p. 69 ; *Lawrence's Wheaton, Elements of Intern. Law*, p. 552, § 14 ; *Phillimore's Intern. Law*, v. 3, §§ 67, 73 ;

\* For a recent statement of English rules as to apportionment of joint booty, see *Banda & Kirwee Booty*, *Law Rep.*, 1 *Adm. & Ecc.*, 109.

As to division of trophies and booty between co-operating armies, see 6 *De Clercq*, 569, 584 ; also treaty between France and Great Britain, 8 *De Clercq*, pp. 26, 29 ; and see also *Id.*, p. 35.

*Bynkershoeck, Quæst. Jur. Pub.*, lib. 1, cap. 10; *Chitty, Law of Nations*, pp. 11, 12; *Heffter, Droit International*, §§ 120-123; *Halleck, Intern. Law & Laws of War*, p. 359.

Between allied nations pursuing a common cause against a common enemy, it must be taken as an implied, if not an express contract, that one State shall not do anything to defeat the general object. If one admit its subjects to carry on an uninterrupted trade with the enemy, the consequence may be that it will supply that *aid and comfort* to the enemy which may be very injurious to the prosecution of the common cause, and the interests of its ally. The *Neptunus*, 6 *Robinson's Adm. Rep.*, 403.

*Separate compacts not binding.*

**950.** Unless allies have otherwise agreed, neither is bound by compacts with the enemy, made without its consent, by the other.

See *Halleck, Intern. Law & Laws of War*, p. 850, and authorities cited.

*Prize courts.*

**951.** Either of several allied belligerents may by assent of another establish a prize court within the limits of the other, for the purposes of deciding questions of prize.



# DIVISION FIFTH.

## NEUTRALS.

- ARTICLE** 952. Who are neutrals.
953. Right to be neutral.
954. Attempt to involve a neutral.
955. "Breach of neutrality" defined.
956. "Violation of neutrality" defined.
957. Effect of a breach of neutrality.
958. Kinds of assistance.
959. Active assistance.
960. Passive assistance.
961. Intervention.
962. Recognizing independence of insurgents.
963. Mediation.
964. Active duties of neutrals.
965. Breach of neutrality not justified by precedent obligation
966. Aid to sick and wounded.
967. Pilotage.
968. Purchase of conquest forbidden.
969. Time when duties of neutrality take effect.
970. Liability for negligence in enforcing neutrality.
971. Violations of neutrality.
972. Land forces violating neutrality to be disarmed.
973. Right of asylum limited.
974. Supplies limited.
975. Protection of hostile ships in neutral port.
976. Priority of departure.
977. Prizes not to be sent into neutral ports.
978. Restoration of prizes captured in violation of neutrality.
979. Transactions in breach of neutrality everywhere void.
980. Breaches and violations of neutrality declared public offenses.
981. Redress for injuries in violation of neutrality.
982. Neutral and belligerent rights and obligations not affected by adverse belligerent not being a party to Code.

*Who are neutral.*

**952.** A neutral nation is one that remains on terms of friendship and amicable intercourse with the government and members of each of two or more belligerents.

British proclamation of neutrality—Franco-German war. *London Gazette*, July 19, 1870.

*Right to be neutral.*

**953.** Every nation, unless it has otherwise agreed, has a right to remain at peace, though all the rest of the world be at war, and to maintain friendly relations with any belligerent, without offense to others.

*Fioré, Nouveau Droit Intern.*, v. 2, p. 360 ; citing *Galiana, dei Doveri dei principi*, pt. 1, c. 3 ; and *Hautefeuille, Droit et devoir des Nations*, t. 1, p. 376 ; *Address of CH. FR. ADAMS, New York*, 1870.

*Attempt to involve a neutral.*

**954.** The attempt of a belligerent, by force or pressure of any kind, to make a neutral nation take any part, however small, with one side or the other, is an attempt against its independence.

*“Breach of neutrality” defined.*

**955.** The terms “breach of neutrality,” as used in this Code, mean an act or omission on the part of a neutral nation inconsistent with its duty as such toward a belligerent.

*“Violation of neutrality” defined.*

**956.** The terms “violation of neutrality,” as used in this Code, mean an act or omission on the part of a belligerent inconsistent with the rights of a neutral nation as such.

*Effect of a breach of neutrality.*

**957.** A neutral nation is bound to refrain from assisting either belligerent directly or indirectly, and must forbid its members and domiciled residents from

so doing.' If it assist either belligerent by acts or omissions which directly subserve the purposes of the war, or by affording to one while withholding from the other that which indirectly subserves such purposes, it departs from its neutrality, and is liable to be treated as an ally, after complaint made by the other belligerent, as in other cases.

If the act of assistance be an aggressive act by force, the aggrieved belligerent may defend itself without previous complaint, as in case of any other aggression.

It is the better opinion that to grant a passage to the troops of one belligerent is a violation of neutral duty to the other. *Halleck, Intern. Law & Laws of War*, p. 517. *Twiss*, however, (*Law of Nations*, pt. II., p. 442, § 218,) and several earlier authors oppose this view.

<sup>1</sup> This clause would enlarge the rule of neutrality.

*Ortolan* has shown that the definition given by *Azuni* and others, (and approved by *Fioré*,) to the effect that neutrality is a continuation of a state of peace by one nation while others are at war, is inadequate, because neutrality imposes duties and obligations unknown in peace.

The doctrine of neutrality requires more than abstaining from promoting the war. Instance the case put by *Fioré*, (*Nouveau Droit Intern.* v. 2, p. 368,) of Russia at war with Turkey and Sweden, and Austria declaring itself an ally of Russia against Turkey, Austria could not be regarded as a neutral toward Sweden.

There are early authorities to the effect that where one State stipulates to furnish to another a limited succor of troops, ships of war, money or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succor the enemy of the opposite belligerent, but it only becomes such so far as respects the auxiliary forces thus supplied. In all other respects it remains neutral. *Lawrence's Wheaton, Elements of Intern. Law*, p. 480, § 14; *Halleck, Intern. Law and Laws of War*, p. 419, § 14; and authorities cited. This, however, should not be allowed, under the modern doctrine of neutrality.

### *Kinds of assistance.*

**958.** Assistance is of two kinds :

1. Active ; and,
2. Passive.

### *Active assistance.*

**959.** Active assistance is that which is rendered by the government.

*Passive assistance.*

**960.** Passive assistance is that which is rendered by the members or domiciled residents of the nation, and which it permits, either expressly, or by not preventing it, or which, on complaint, it refuses to redress.

*Intervention.*

**961.** No nation has a right to intervene between any other nations engaged in war. To intervene is to become a party to the war.

If the principles of intervention can not stand, treaties of guaranty, which contemplate such intervention, must be condemned also: for they have in view a resistance, at some future time, to the endeavors of third parties to conquer, or in some way control the guaranteed States. An agreement, if it involve an unlawful act, or the prevention of lawful acts on the part of others, is plainly unlawful. *Woolsey's Intern. Law*, § 42, note, p. 57.

*Recognizing independence of insurgents.*

**962.** So long as a nation is engaged in a domestic war with a portion of its own members, any other nation which recognizes their independence commits an act of aggression, and becomes a party to the war. But it may without offense recognize them as belligerents.

See *Lawrence's Commentaire sur Wheaton*, pt. I., ch. II., p. 174.

Recognizing them as belligerents for the purposes of the war is allowed by Article 708.

By Article 118, the reception of a public minister from the insurgents would be a recognition of their independence.

*Mediation.*

**963.** Every nation, party to this Code, may freely offer to mediate between any two or more of the other parties, who may be engaged in war; and neither the offer to mediate, nor the rejection of the offer, shall be deemed an unfriendly act. But no nation may offer to mediate between a nation and its own members, engaged in domestic war.

If it be deemed best to extend the restriction against mediation in domestic wars to the case of such wars in nations not parties to the Code.

it should be considered whether an exception should not be made of cases where the laws of civilized warfare laid down in Part VIII., entitled THE CONDUCT OF WAR, are disregarded.

*Woolsey*, however, recognizes an exception in the case of crimes committed by a government against its subjects. *Woolsey, Intern. Law*, § 42, p. 52. See also, *Id.*, § 50, p. 73; and *Lawrence's Wheaton, Elements of Intern. Law*, p. 128, § 9; *Dana's Wheaton*, § 69, p. 115.

### *Active duties of neutrals.*

#### 964. A neutral government is bound:

1. To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended thus to cruise or carry on war, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use;

2. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men;

3. To use due diligence to prevent its members and domiciled residents, and other persons within its jurisdiction, from engaging in any traffic which is contraband or otherwise interdicted under the provisions of this Code,<sup>1</sup> and from doing any act within its territorial limits which directly subverts the purposes of the war;<sup>2</sup> and,

4. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the obligations of neutrals defined in this Division of the Code.<sup>3</sup>

This article, with the exception of the third subdivision, which is new, embraces substantially the rules adopted in the Treaty of Washington for the government of the arbitrators at Geneva in deciding the matters submitted to them, and also for the government of the parties to the treaty in the future; and which they agreed to bring to the knowledge of other maritime nations, inviting their adoption of them.

<sup>1</sup> This subdivision is intended to impose a more stringent restriction on neutral traffic in contraband than now exists.

<sup>2</sup> The better opinion is that loans of money can not be raised by a belligerent in a neutral State, without a violation of the latter's neutrality. *Halleck, Intern. Law and Laws of War*, p. 526; *Kennett v Chambers*, 14 *Howard's U. S. Supr. Ct. Rep.*, 38, 44; *Gardner's Institutes*, ch. XI., § 10.

During the Franco-Prussian war, Mr. GLADSTONE stated that, after consulting the law officers of the crown, the Government had decided that it would be a breach of neutrality for an English company to lay a telegraphic cable between Dunkirk and some northern point connected with Denmark. *Annual Register*, 1870, p. 102.

On a hearing in the Court of Admiralty, on a charge that the International, a ship belonging to the Telegraph Works Company, was about to sail for France, to lay a cable along the French coast, from Dunkirk to Verdon, it was held that the proposed line was characteristically a commercial and not a military one; and the fact, that it might serve a military purpose, was not ground of condemnation under the statute. Reported in *London Times*, January 18, 1871, quoted in *Foreign Relations of the United States*, 1871, pp. 424, 425.

For declarations of neutrality issued by neutral powers during various wars, see *Bernard's Neutrality of Great Britain during the American Civil War*, pp. 135-150.

<sup>3</sup> This subdivision, taken from the Treaty of Washington, is here extended so as to include all breaches of neutrality.

### *Breach of neutrality not justified by precedent obligation.*

**965.** An act which, according to the provisions of this Chapter, is a breach of neutrality, is not excused by the existence of an obligation contracted before the war, to perform or suffer such act. If such obligation was not contracted with express reference to performance during war, the neutral nation may suspend performance during the war, and thereby preserve its neutrality.

The authorities are in conflict as to whether assistance rendered to a belligerent, in pursuance of a previous compact, is a breach of neutrality. See *Hautefeuille*, tit. IV., § II.; *Fioré, Nouveau Droit Intern.*, v. 2, p. 366, who assert that it is.

The more numerous authorities support the doctrine, that furnishing to a belligerent a moderate succor, due in virtue of a former defensive alliance, is not a departure from a strict neutrality. *Halleck, Intern. Law and Laws of War*, p. 514; *Wheaton, Elements of Intern. Law*, p. 710, § 5;

*Dana's Wheaton*, § 424; *Twiss, Law of Nations*, Part II., p. 430, and authorities cited.

It does not seem practicable to lay down any well defined rule respecting such violations of neutrality, under color of a previous obligation; and it is thought that, as between the nations uniting in the Code, the exception stated ought not to be continued. These nations may properly reserve the right to renounce any such obligation, on the breaking out of a war, which renders its performance a breach of neutrality, unless it be an alliance expressly contemplating war; in which case, performance ought to be considered a belligerent act. See Article 537, which provides for an alliance to enforce the provisions of the Code.

*Aid to sick and wounded.*

**966.** Sick and wounded soldiers and sailors, singly and collectively are neutral so long as they are unable to serve their nation, and succor to them in any form whatever is not a breach of neutrality.

In the Franco-Prussian war, 1870, the German wounded were refused passage through Belgium, on the objection of France that it would be a breach of neutrality to allow it. It should seem that there ought to be no such restriction.

*Pilotage.*

**967.** No assistance can be given by a pilot of a neutral nation to a public armed ship of a belligerent, except in cases of entering or departing, provided for by article 845, or in cases of distress.

Mr. GLADSTONE'S answer to Mr. HODGSON, House of Commons, August 8, 1870.

*Purchase of conquest forbidden.*

**968.** A neutral can not purchase or take possession of a conquered territory from the conqueror, while the war continues.

It is inconsistent with neutrality to do so; for either paying for it, or maintaining possession against the original owner, is aiding his adversary. *Twiss, Law of Nations*, pt. II., p. 127.

*Halleck, (Intern. Law and Laws of War*, p. 802,) however, asserts the general right of neutrals to purchase in good faith.

*Time when duties of neutrality take effect.*

**969.** The obligations imposed by this Division, on

a neutral nation, attach from the time that either belligerent has officially communicated to it the declaration of war ; or from the time that it voluntarily makes public in its own jurisdiction, a declaration of its neutrality.

See Article 709, and note.

*Liability for negligence in enforcing neutrality.*

**970.** A neutral nation that fails to exercise a degree of diligence in enforcing the provisions of article 964, in exact proportion to the risks to which either belligerent may be exposed by failure to fulfill the obligations of neutrality on the part of such neutral, is bound to indemnify the belligerent aggrieved thereby for all losses directly resulting from such breach of neutrality.

This is the rule of diligence declared obligatory upon neutral nations by the decision of the tribunal of Arbitration of the Alabama Claims, under the Treaty of Washington. The British government, however, contended for a more lax rule. In the British case it was said that a charge against a sovereign government of having evinced culpable negligence in the exercise of one of the powers of sovereignty, is an imputation which should be sustained by strong and solid reasons. Every sovereign government asserts the right of being independent of all supervision of all foreign intermeddling in the exercise of these powers ; and it must be assumed that they are exercised with good faith and with reasonable diligence, and that the administration of the laws is just and uniform, so long as this assumption is not set aside by proof to the contrary—an assumption without which it would be impossible to have peace and friendly relations among nations. It is not sufficient to indicate or to demonstrate that a government, in exercising a reasonable discretion on a question of fact or of law, and in making use of the means at its control for acquiring information, forms, for the regulation of its conduct, an opinion which another government may repudiate or may ask an arbitrator to repudiate. Still less is it sufficient to demonstrate that a judgment rendered by a competent judicial court, and by which the executive was guided, is tainted with error. An administrative act based on an error or the erroneous decision of a tribunal, may, it is true, give cause under certain circumstances for a demand for compensation on the part of the person or government wronged by this act or decision. But the charge of negligence against a government should not be established on such basis. It does not suffice to point out or to show that in the execution of his administrative duties, a government officer acted so as to leave something, however small, to be desired as regards judgment or penetration, or even that he remained within the limits of all possible promptitude and celerity. To found on this basis exclusively a demand



for reparation as if it were an infraction of international law, would be exacting in international questions an administrative perfection to which few, if any, governments could in fact attain, or could reasonably hope to attain in their internal affairs; it would be establishing a rule which it would be impossible to apply and which would be consequently unjust and fallacious; it would finally give rise to incessant and exaggerated claims as the occasion offered, and would render the position of a neutral intolerable. On the other hand, a nation ought not to be held responsible for a delay or omission which may be due simply to accident and not to a want of foresight or reasonable care. Finally, it does not suffice to demonstrate that an act has been committed which the government should have foreseen. What must be advanced and proved is that the government failed to exercise the same amount of care as it usually employs in internal affairs, and which it may be reasonably required to use in matters affecting international interests and duties.

The rule stated in the foregoing Article seems, however, a just one, and has the advantage of being clear and definite, while a rule referring to the diligence used in municipal affairs affords no just criterion, since the degree of diligence may vary in different places.

### *Violations of neutrality.*

**971.** Every voluntary entrance of belligerent forces, by land or sea, within the territorial limits of a neutral nation, with hostile purpose, and every hostility therein, except in case of an instant and unavoidable necessity of self-defense, is a violation of neutrality.<sup>1</sup>

Such a violation of neutrality may be immediately repelled by the neutral, by force.<sup>2</sup>

<sup>1</sup> Halleck, *Intern. Law & Laws of War*, pp. 517-521, and authorities cited.

<sup>2</sup> *Id.*, p. 517; *Lushington's Naval Prize Law*, p. 62, § 266.

*Lushington* says, that a commander may pass over neutral territorial waters, in order to effect a capture beyond, provided they are not waters which can not be usually passed through without express permission *Naval Prize Law*, p. 63, § 274.

### *Land forces violating neutrality to be disarmed.*

**972.** If the land forces of a belligerent enter neutral territory, it is the duty of the neutral immediately to disarm them, release their prisoners, and cause them to restore all booty which they may bring with them.

*Halleck, Intern. Law and Laws of War*, p. 524, and authorities cited.

### *Right of asylum limited.*

**973.** No public armed ship of a belligerent can enter

a neutral port or roadstead, for any purpose whatever during the continuance of hostilities, except in case of distress, or when sent solely for the purpose of official communication with the neutral nation. When such a ship enters in case of distress, it must remain during the continuance of hostilities.

This rule is new.

The existing rule is that either belligerent may claim the right of asylum for its vessels of war, public or private, and their prizes, unless the neutral nation has signified its refusal of asylum. 7 *Opinions of U. S. Attorneys-General*, 122.

*Supplies limited.*

**974.** No public armed ship of a belligerent, while in waters within the jurisdiction of a neutral nation, shall take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry her to the nearest port of her own nation.

Earl Granville's Instructions to the British Admiralty, July 19, 1870.

*Protection of hostile ships in neutral port.*

**975.** No public armed ship of a belligerent shall leave any waters subject to the jurisdiction of a neutral, from which any ship of the other belligerent, whether public or private,<sup>1</sup> shall have previously departed, until after the expiration of at least twenty-four hours from such departure, unless the commander give his word of honor not to attack, visit, or give chase to, the latter ship during the whole of her immediate voyage.<sup>2</sup>

Earl Granville's Instructions to the British Admiralty, July 19, 1870.

<sup>1</sup> As other provisions of the Code exempt private property not contraband, and render the conveying of contraband a public offense, it might be well to restrict this provision to public ships and such private ships as present evidence of sailing without contraband.

<sup>2</sup> This rule, which *Hautefeuille* proposes as a substitute for the twenty-four hour rule, might be advantageously adopted as an alternative.

*Priority of departure.*

**976.** In the cases provided for by the last article, the

ship which came into the neutral waters first has a right and may be required to leave first, if ready for sea.

To secure this right, the ship must give to the local authorities reasonable previous notice of intention to leave, must punctually adhere thereto, and not return before the termination of the twenty-four hours.

*Bernard's Neutrality of Great Britain during the American Civil War*, p. 274; citing *De Pistoye et Duverdy, Traite des Prises, Maritimes*, vol. 1, p. 108; *Hautefeuille*, vol. 1, p. 366; *Ortolan, Diplomatie de la Mer*, vol. 2, p. 257.

*Prizes not to be sent into neutral ports.*

**977.** No belligerent shall send any prize taken by it into the waters of a neutral.<sup>1</sup> A violation of this article is an abandonment of the prize.

<sup>1</sup> This rule is new. It is drawn from Earl Granville's Instructions to the British Admiralty, July 19, 1870.

*Restoration of prizes captured in violation of neutrality.*

**978.** It is the duty of a neutral nation to take possession of prizes captured within its territorial limits, or sent within such limits, by a belligerent, in violation of its neutrality, whenever such prizes can be found within its jurisdiction; and, on application of the nation aggrieved, to restore the same to their owners.

*Halleck, Intern. Law and Laws of War*, p. 530; *Wheaton, Elements of Intern. Law*, pt. IV., ch. 3, § 13.

Of course this Article will not apply where the validity of the capture has been adjudged in a prize court; because by other provisions of the Code, full faith and credit must be given in each nation to the judgments of the courts of every other.

*Transactions in breach of neutrality everywhere void.*

**979.** It is the duty of the courts of a neutral nation to treat as unlawful all transactions of belligerents and of neutrals in violation of the provisions of this Book, or in violation of prohibitions lawfully declared under them.

The present law of nations leaves the enforcement of blockades to

the belligerents, and neutral courts will not annul a contract to export contraband, (Chavasse, *Ex parte, in re Grazebrook*, 11 *Jurist, N. S.*, 400; 34 *Law Jour., Bank.*, 17; 13 *Weekly Rep.*, 627; 12 *Law Times, N. S.*, 249; *The Helen*, 11 *Jurist, N. S.*, 1025; 35 *Law Jour., Adm.*, 2; 1 *Law Rep. Adm.*, 1,) or relieve against an illegal recapture; though this has been contested. *Bernard's Neutrality*, pp. 327-9. But when contraband traffic only is made illegal, the obligation of the neutral may properly be made co-extensive.

*Breaches and violations of neutrality declared public offenses.*

980. Any person committing an act within the territorial limits of a neutral nation, which involves either a breach or a violation of its neutrality, except one acting under lawful superior authority, is guilty of a public offense.

See *Halleck, Intern. Law and Laws of War*, pp. 528-531; 1 *Duer on Insurance*, pp. 754-775.

*Redress for injuries in violation of neutrality.*

981. A neutral nation is bound, so far as it has jurisdiction, to afford a remedy for all injuries which one belligerent may commit upon the other, within the limits of the neutral, and in violation of its neutrality.

*Halleck, Intern. Law and Laws of War*, p. 516; and authorities there-cited. The above Article would extend somewhat the existing rule, which limits the redress given by a neutral to a restoration of the prize, with costs. See *Twiss, Law of Nations*, Part II., p. 487. There seems to be no good reason why the neutral courts should not afford full redress, if persons or property come within their jurisdiction.

*Neutral and belligerent rights and obligations not affected by adverse belligerent not being a party to Code.*

982. The provisions of this Code, in reference to the relative rights and obligations of neutrals and belligerents, apply between nations, parties to this Code, although the adverse belligerent be not a party hereto.

It may not be deemed practicable to adopt all the provisions of this Book without reciprocity. To the extent here expressed, however, perhaps it may be feasible and advantageous to do so.

## DEFINITIONS AND GENERAL PROVISIONS

### ARTICLE 983. Words, how used.

- 984. Words elsewhere defined.
- 985. Good faith.
- 986. Notice.
- 987. Actual notice.
- 988. Constructive notice.
- 989. Certain persons deemed to have constructive notice.
- 990. Who are principals.
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- 1001. Bribery or menace of public agent.
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- 1005. Violation of any provision of the Code by public agent.
- 1006. Accessions of nations to this Code.
- 1007. Rescission of adoption of Code.
- 1008. Time when adoption, of rescission of adoption, of Code takes effect.

### *Words, how used.*

**983.** Words used in this Code are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.

*Civil Code, reported for New York, § 1999.*

*Words elsewhere defined.*

**984.** Whenever the meaning of a word or phrase is defined in any part of this Code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

*Civil Code, reported for New York, § 2000.*

A list of all words elsewhere defined appears in the index under the title DEFINITIONS.

*Good faith.*

**985.** Good faith consists in an honest intention to abstain from taking any unconscientious advantage, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.

*Civil Code, reported for New York, § 2007.*

*Notice.*

**986.** Notice is either actual or constructive.

*Civil Code, reported for New York, § 2008.*

*Actual notice.*

**987.** Actual notice consists in express information of a fact.<sup>1</sup> The duty of giving notice, imposed by any provision of this Code, requires actual notice.

<sup>1</sup> *Civil Code, reported for New York, § 2009.*

*Constructive notice.*

**988.** Constructive notice is notice imputed by the law to a person not having actual notice.

*Civil Code, reported for New York, § 2010.*

*Certain persons deemed to have constructive notice.*

**989.** Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

*Civil Code, reported for New York, § 2011.*

*Who are principals.*

**990.** All persons concerned in the commission of any offense against the provisions of this Code, whether they directly commit the act constituting the offense, or aid or abet in its commission though not present, are principals.

*The Penal Code, reported for New York, § 27.*

*Who are accessories.*

**991.** All persons who, after the commission of any offense against the provisions of this Code, conceal or aid the offender with knowledge that he has committed such offense, and with intent that he may avoid or escape from arrest, trial, conviction or punishment, are accessories.

*The Penal Code, reported for New York, § 28.*

*Genders.*

**992.** Words used in this Code in the masculine gender include the feminine, except where a contrary intention plainly appears.

*Civil Code, reported for New York, § 2026.*

*Numbers.*

**993.** Words used in this Code in the singular number include the plural, and the plural the singular, except where a contrary intention plainly appears.

*Civil Code, reported for New York, § 2027.*

*Computation of time.*

**994.** Time expressed in days or hours in any provision of this Code, or in any agreement or instrument to which this Code is applicable, is to be computed by excluding the first and including the last, except where a contrary intention plainly appears.

See the conflict of authorities on this point in respect to armistice and truce, in *Halleck, Intern Law and Laws of War*, p. 659.

Good reasons can be given for either of the rules that have been suggested. The important consideration is to have an uniform rule, which accords with common usage and opinion.

*Code everywhere locally binding.*

**995.** The provisions of this Code, and the amendments and additions which may be made thereto, and regulations agreed on by the nations uniting in it, in order to carry its provisions into effect,<sup>1</sup> shall be binding upon all persons, officers and tribunals in such nations, anything in their local laws to the contrary notwithstanding.

<sup>1</sup> Such regulations are contemplated by Articles 442, 445, 468, 476, 482, 538, 702, etc.

*National powers, how exercised.*

**996.** National powers mentioned in this Code without designating the department of government by which they are to be exercised, may be exercised by any department authorized by the constitution and laws of the nation.

In some cases the Code, as is usual with treaties, requires the act of a particular department, as in the case of the letters of credence of a public minister, or the passport of a ship, which must be issued by the executive department; or, as in case of extradition, which contemplates the concurrence of acts of the judiciary and the executive. In others, as in the case of the treaty-making power, the question is determined by the domestic constitution.

*Powers and jurisdiction not obligatory.*

**997.** The exercise of the powers, judicial or otherwise, declared by this Code to belong to each nation, is not obligatory upon it, except where it is expressly so declared, or where the Code gives a right which is dependent on the exercise of the power.

The Code declares the exercise of power obligatory in some cases, such as extradition. In some others it gives a right which is equivalent, as in the case of provisions allowing foreigners to sue in the courts. In most cases, as, for instance, in case of the jurisdiction to grant divorces, it merely defines the extreme limit of national jurisdiction, leaving each nation to go as far in the exercise of such judicial power, as its laws may provide.

*Forging or counterfeiting public securities, &c.*

**998.** Every person who, within the jurisdiction of



a nation, party to this Code, with intent to defraud, forges, counterfeits, or falsely alters :

1. The great seal or principal seal of any nation or state whatever ; or the seal of any court or tribunal, or public officer authorized or created by the law of any nation, or who falsely makes, forges or counterfeits any impression, purporting to be the impression of any such seal ;<sup>2</sup> or,

2. Any certificate or other public security issued, or purporting to have been issued under the authority of any nation whatever, by virtue of any law thereof, by which certificate or other public security the payment of any money or delivery of any property; absolutely or upon any contingency, is promised, or the receipt of any money or property acknowledged :<sup>1</sup> or,

3. Any gold or silver coin issued by the government of any nation whatever, to subserve the purposes of money, with intent to sell, utter, use or circulate the same as genuine within any nation whatever, or to injure or defraud any nation whatever, or the members thereof ;<sup>3</sup> or,

4. Any postage or revenue stamp of any nation whatever, or who sells, or offers, or keeps for sale as genuine, or as forged any such stamp knowing it to be forged, counterfeited, or falsely altered ; or,

5. Any postal money order, certificate, receipt, or other writing for the purpose of obtaining, or receiving or of enabling any other person to obtain or receive from any nation whatever, or any of its officers or agents, or its post department any sum of money ; or,

6. Any public act, record or judicial proceeding of the tribunals ; or any certificate of acknowledgment or proof, or other official certificate, of any officer or agent of any nation whatever, intended for use within any nation, party to this Code ;

Is guilty of a public offense.

By this and the next Article, certain offenses against the law of any

nation whatever, whether a party to the Code or not, are declared *public offenses*, and therefore punishable, as prescribed by Article 1003.

<sup>1</sup> *The Penal Code, reported for the State of New York*, § 554; Act of Congress of the United States, March 3, 1825, § 27, 4 *U. S. Stat. at L.*, 115.

<sup>2</sup> *The Penal Code, reported for the State of New York*, § 555.

<sup>3</sup> *Id.*, §§ 557, 568.

*Uttering forged instrument or coin.*

**999.** Every person who, with intent to defraud, utters or publishes as true, within the jurisdiction of any nation, anything, the forging, altering or counterfeiting of which is hereinbefore declared to be punishable, knowing the same to be forged, altered or counterfeited, is guilty of a public offense.

*The Penal Code, reported for the State of New York*, § 577.

*Perjury.*

**1000.** Every person who commits perjury or subornation of perjury before a tribunal or officer of any nation, a party to this Code, on the taking of testimony pursuant to an application of a foreign tribunal, under article 664, is guilty of a public offense.

*Bribery or menace of public agent.*

**1001.** Every person who gives or offers any bribe to, or attempts, by threats or violence, or any other corrupt means, to influence any officer, agent or servant of a nation, a party to this Code, of which the person offending is not a member, or to whose jurisdiction he is not subject, in respect to any matter affecting the duty of such officer, agent or servant to his nation, is guilty of a public offense.

If a member of a nation, being within its jurisdiction, corrupt its officers, it is a matter of municipal cognizance. But if he take advantage of being in any other jurisdiction to commit the offense, or if he be a foreigner, the offense may well be cognizable by either nation.

*Violation of provisions of the Code, by whom punishable.*

**1002.** Any willful violation of a provision of this Code, whether declared to be a public offense or not, is

punishable, when jurisdiction of the person of the offender is acquired, either by the nation aggrieved thereby, or by that within whose jurisdiction the offense was committed,

For public offenses, extradition is allowed by Article 214. The case of conflicting claims for possession of the offender, is provided for by Article 224.

*Punishment for public offenses.*

**1003.** The punishment of any act which is declared to be a public offense by the provisions of this Code, shall be that which is prescribed by the law of the place where the conviction is had, for the same or a similar infraction of its criminal law.

*Punishment of other violations of the Code.*

**1004.** Any willful violation of a provision of this Code, not otherwise provided for, is a misdemeanor punishable by fine, not exceeding the amount of the injury done, and five thousand dollars in addition thereto, or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.

*Violation of any provision of the Code by public agent.*

**1005.** No violation of any provision whatever of this Code, by any officer, agent, or servant of any nation, party thereto, in obedience to the lawful authorities of his nation, shall be deemed a public offense, punishable under this Code; but redress must be sought from his own nation.

*Accessions of nations to this Code.*

**1006.** Any nation may accede to this Code or any part thereof, by adopting or ratifying the same in the form prescribed by its own constitution and laws, and giving notice thereof to all the other parties.

<sup>1</sup> Thus, BOOK FIRST, on PEACE, might be adopted, without the Book on WAR ; or, the UNIFORM REGULATIONS FOR MUTUAL CONVENIENCE, Part III., or any of the twelve Titles therein contained, might be acceded to, separately ; or, Division Second, on PRIVATE INTERNATIONAL LAW ; and so of several other portions of the Code.

*Rescission on adoption of Code.*

**1007.** Any nation may in the same manner as prescribed in the last article for its adoption, rescind its adoption of the Code, as to the whole or any part of it, whether such adoption was partial or entire.

Amendments to the Code are provided for by Article 538.

*Time when adoption, or rescission on adoption, of Code takes effect.*

**1008.** The adoption of this Code by any nation shall take effect at the expiration of one year from the notice required by article 1006, unless an earlier time is fixed by the notice.

A rescission of such adoption shall take effect at the expiration of one year after notice of the rescission, unless a later time is fixed by the notice.

# APPENDIX.

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- I. INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.
- II. PROJECT OF THE BRUSSELS CONFERENCE.
- III. APPLICABILITY OF INTERNATIONAL LAW TO ORIENTAL NATIONS.
- IV. PROPOSITION OF THE GOVERNMENT OF PERU FOR A CONFERENCE ON INTERNATIONAL LAW.



# INSTRUCTIONS

FOR THE

## GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.

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GENERAL ORDERS, }

No 100.

WAR DEPARTMENT,  
ADJUTANT-GENERAL'S OFFICE,  
*Washington, April 24, 1863.*

The following "Instructions for the Government of Armies of the United States in the Field," prepared by FRANCIS LIEBER, LL.D., and revised by a Board of Officers, of which Major-General E. A. HITCHCOCK is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.

BY ORDER OF THE SECRETARY OF WAR :

E. D. TOWNSEND,  
*Assistant Adjutant-General.*

### SECTION I. *Martial law—Military jurisdiction—Military necessity—Retaliation.*

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its Martial Law.

2. Martial Law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief; or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. Martial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place

or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4. Martial Law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not Martial Law; it is the abuse of the power which that law confers. As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5. Martial Law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed—even in the commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under Martial Law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under Martial Law, or continue only with the sanction, or if deemed necessary, the participation of the occupier or invader.

7. Martial Law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to Martial Law in cases of urgent necessity only: their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of Ambassadors, Ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10. Martial Law affects chiefly the police and collection of public



revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety, and the safety of its operations.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offenses to the contrary shall be severely punished, and especially so if committed by officers.

12. Whenever feasible, Martial Law is carried out in cases of individual offenders by Military Courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13. Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the "Rules and Articles of War," or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of

war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God.

16. Military necessity does not admit of cruelty, that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18. When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and pro-

tection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of a regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and co-existence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.—*Public and private property of the enemy—Protection of persons, and especially women; of religion, the arts and sciences—Punishment of crimes against the inhabitants of hostile countries.*

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district or place permanently as its own, and make it a portion of its own country.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the

armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality ; strictly private property ; the persons of the inhabitants, especially those of women ; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offenses of the owner, can be seized only by way of military necessity, for the support or other benefit of the army of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war—such as judges, administrative or police officers, officers of city or communal governments—are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

42. Slavery, complicating and confounding the ideas of property, (that is of a *thing*,) and of personality, (that is of *humanity*,) exists according to municipal law or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that “so far as the law of nature is concerned, all men are equal.” Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection

of the military forces of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of post-liminy, no belligerent lien or claim of service.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.

47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

### SECTION III. *Deserters—Prisoners of war—Hostages—Booty on the battle-field.*

48. Deserters from the American army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American army; and if a deserter from the enemy, having taken service in the army of the United States, is captured by the enemy, and

punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency, and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise under a duly authorized levy, *en masse* to resist the invader, they are now treated as public enemies, and if captured, are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are no individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States can not retaliate by enslavement: therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

63. Troops who fight in the uniform of their enemies without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy is



battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States, or is an enemy captured after having committed his misdeed.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they had been placed in the private luggage of the prisoners.

73. All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before

his capture. The captured officer to whom they may be restored can not wear them during captivity.

74. A prisoner of war being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The government alone releases captives, according to rules prescribed by itself.

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76. Prisoners of war shall be fed upon plain and wholesome food whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77. A prisoner of war who escapes, may be shot, or otherwise killed in his flight ; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death ; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

78. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners, in order to extort the desired information, or to punish them for having given false information.

#### SECTION IV.—*Partisans—Armed enemies not be longing to the hostile army—Scouts—Armed prowlers—War-rebels.*

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the

main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they, if discovered and secured before their conspiracy has matured to an actual rising, or to armed violence.

#### SECTION V.—*Safe-conduct—Spies—War-traitors—Captured messengers—Abuse of the flag of truce.*

86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority.

Contraventions of this rule are highly punishable.

87. Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state, and not by subordinate officers.

88. A spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

89. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war-traitor is always severely punished. If his offense consists in betraying to the enemy anything concerning the condition, safety, operations or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offense.

93. All armies in the field stand in need of guides, and impress them if they can not obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign

visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99. A messenger carrying written dispatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103. Spies, war-traitors, and war-rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

## SECTION VI. *Exchange of prisoners—Flags of truce—Flags of protection.*

105. Exchanges of prisoners take place—number for number—rank for rank—wounded for wounded—with added condition for added condition—such, for instance, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior

rank as may be agreed upon by cartel, which requires the sanction of the government, or of the commander of the army of the field.

107. A prisoner of war is in honor bound truly to state to the captor his rank ; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange ; nor a higher rank, for the purpose of obtaining better treatment.

Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or in urgent cases, of provision, clothing, or other necessities.

Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it can not be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable so soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

111. The bearer of a flag of truce can not insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such a flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in

battles, when hospitals are situated within the field of the engagement.

116. Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy or fendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

#### SECTION VII.—*The parole.*

119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120. The term *parole* designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121. The pledge of the parole is always an individual but not a private act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125. When paroles are given and received, there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individual giving them to

the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battle-field, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

129. In capitulations for the surrender of strong places or fortified camps, the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131. If the government does not approve of the parole, the paroled officer must return into captivity; and should the enemy refuse to receive him, he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army; and upon their failure to give it, he may arrest, confine, or detain them.

### SECTION VIII.—*Armistice—Capitulation.*

135. An armistice is the cessation of active hostilities for a period agreed upon between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared, without conditions, it extends



no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137. An armistice may be general, and valid for all points and lines of the belligerents ; or special—that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time ; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, do in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement ; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends ; but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed if any.

If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

142. An armistice is not a partial or a temporary peace ; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works, as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of defense within the place during an armistice, this

point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition, in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145. When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

146. Prisoners, taken in the act of breaking an armistice, must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice: in the latter case, the war is carried on without any abatement.

#### SECTION IX.—*Assassination.*

148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism.

#### SECTION X.—*Insurrection—Civil war—Rebellion.*

149. Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

151. The term *rebellion* is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same who seek to throw off their allegiance to it, and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife, and settles the future relations between the contending parties.

154. Treating, in the field, the rebellious enemy according to the law and usages of war, has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155. All enemies in regular war are divided into two general classes; that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion, without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy, without being bodily forced thereto.

156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war, as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appro-

priate, or if his government demands of him, that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law, and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops, is levying war against the United States, and is therefore treason.

# PROJECT OF THE BRUSSELS CONFERENCE.

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## PROJECT OF AN INTERNATIONAL DECLARATION CONCERNING THE LAWS AND CUSTOMS OF WAR.

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*Of military authority in the territory of the enemy's country.*

**Art. 1.** A territory is considered as occupied when it is placed actually under the authority of the enemy's army. The occupation extends only to the territories where that authority is established and can be exercised.

**Art. 2.** The authority of the legal power being suspended, and having passed actually into the hands of the occupant, the latter shall take all measures in his power with a view to re-establish and assure, as much as possible, order and public life.

**Art. 3.** To this effect he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend, or replace them, except in case of necessity.

**Art. 4.** The functionaries and employees of every order who consent on his invitation to continue their functions shall enjoy his protection. They shall not be dismissed or disciplinarily punished unless they fail in the obligations accepted by them, and shall not be delivered up to justice unless they betray them.

**Art. 5.** The army of occupation shall only levy the imposts, duties, rights, and tolls already established for the benefit of the state, or their equivalent, if its impossible to collect them, and as much as possible in the form and according to the existing usage. It shall employ them in defraying the expenses of the administration of the country, in the same proportion as was obliged to be done by the legal government.

**Art. 6.** The army which occupies a territory shall only be able to seize the money, the funds, and securities properly belonging to the state, the depots of arms, means of transport, warehouses, and provisions, and in general all movable property of the state useful in the operations of war.

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Railway material, land-telegraphs, steamboats, and other vessels, not comprised in cases ruled by maritime law, as well as the depots of arms, and in general every kind of munition of war, although belonging to societies or private persons, are equally useful means in the operations of war, and can not be left by the army of occupation at the disposition of the enemy. Railway material, land-telegraphs, as well as steamboats and other vessels above mentioned shall be returned and indemnities settled in time of peace.

**Art. 7.** The state in occupation shall only be considered as administrator and usufructuary of public buildings, lands, forests, and agricultural establishments belonging to the state of the enemy and found in the country occupied. It shall be obliged to keep safe the funds of these properties, and administer them according to the rules of usufruct.

**Art. 8.** The goods of corporations, those of establishments consecrated to religious worship, to charity and instruction, to the arts and sciences, even belonging to the state, shall be treated as private property.

Every seizure, intentional destruction, or degradation of similar establishments, of historical monuments, of works of art or of science, must be prosecuted by the competent authorities.

*Who is to be recognized as a belligerent party—  
Combatants and non-combatants.*

**Art. 9.** The laws, rights, and duties of war apply not only to the army, but also to the militia and to the corps of volunteers, uniting the following conditions:

1. Having at their head a person responsible for his subordinates;
2. Having a distinctive sign, fixed and recognizable at a distance;
3. Carrying arms openly; and
4. Complying in their operations with the laws and customs of war.

In those countries where the militia constitute the army, or make part of it, the denomination of army shall include such militia.

**Art. 10.** The population of an unoccupied territory, which, on the approach of the enemy, spontaneously takes up arms to combat the invading troops, without having had time to organize itself in conformity with Article 9, shall be considered as a belligerent, if it respects the laws and customs of war.

**Art. 11.** The armed forces of the belligerent parties may be composed of combatants and non-combatants. In case of capture by the enemy both of them shall enjoy the rights of prisoners of war.

*Means of injuring the enemy.*

**Art. 12.** The laws of war do not recognize in belligerents an unlimited power as to the choice of means for injuring the enemy.

According to this principle are notably interdicted—

*a.* The employment of poison or poisoned arms.

*b.* The murder by treachery of individuals belonging to the nation or army of the enemy.

*c.* The murder of an enemy, who, having laid down his arms, or having no other means of defense, surrenders at discretion.

*d.* The declaration that quarter will not be given.

*e.* The employment of arms, projectiles, or matters causing superfluous injuries, as well as the use of projectiles, prohibited by the declaration of St. Petersburg of 1868.

*f.* The abuse of the flag of truce, of the national flag, or of military insignia, and of the uniform of the enemy, as well as of the distinctive signs of the Geneva convention.

*g.* Every destruction or seizure of an enemy's property which is not imperiously commanded by the necessity of war.

**Art. 14.** The tricks of war, (*ruses de guerre*,) and the employment of means necessary to obtain information about the enemy and the country, (excepting the dispositions of Article 36,) are considered as legal.

*Sieges and bombardments.*

**Art. 15.** Fortified places can only be besieged. Towns, agglomerations of habitations, or open villages which are not defended, can neither be attacked nor bombarded.

**Art. 16.** But if a city or place of war, collection of habitations, or village is defended, the commandant of the besieging troops, before undertaking the bombardment, except in the case of an attack, shall do all that he can to notify the authorities thereof.

**Art. 17.** In such a case all necessary measures must be taken to spare, as far as possible, buildings consecrated to divine worship, or to the arts and sciences, and to charity, hospitals and places for collection of the sick and wounded, on condition that they are not employed at the same time for a military purpose.

The duty of the besieged is to denote these edifices by special visible signs, which are to be indicated in advance to the besieger.

**Art. 18.** A city taken by assault shall not be given up to pillage by the victorious troops.

*Spies.*

**Art. 19.** No one can be considered as a spy except a person acting

clandestinely, or under false pretenses, collects or seeks to collect information in places occupied by the enemy for the purpose of communicating it to the adverse party.

**Art. 20.** A spy taken in the act shall be judged and treated according to the laws enforced in the army which has captured him.

**Art. 21.** A spy who rejoins the army to which he belongs, and who is later captured by the enemy, shall be treated as a prisoner of war, and incur no responsibility for his previous acts.

**Art. 22.** Military men without disguise, who have penetrated into the zone of operations of the hostile army in order to gather information, shall not be considered as spies.

In the same way, military men, (and also civilians openly accomplishing their mission,) charged with the transmission of dispatches destined for their own or the enemy's army, shall not be considered as spies if captured by the enemy.

To this category belong equally, if captured, individuals sent in balloons to transmit dispatches and in general to keep up communication between the different parts of an army or territory.

### *Prisoners of war.*

**Art. 23.** Prisoners of war are legal and disarmed enemies. They are in the power of the enemy's government, but not in that of the individuals or bodies who have captured them. They are to be treated with humanity. Every act of insubordination authorizes in respect to them the necessary measures of rigor.

Everything that belongs personally to them, except their arms, remains their property.

**Art. 24.** Prisoners of war can be subjected to confinement (internment) in any city, fortress, camp, or locality whatsoever, with the obligation of not going beyond certain fixed limits, but they can only be imprisoned as a measure of indispensable security.

**Art. 25.** Prisoners of war can be employed on certain public works which have no direct relation to the operations in the theatre of war, and which are not fatiguing or humiliating to their military rank if they belong to the army, or to their official or social position if they do not form part of it.

They can also, by conforming to the regulations to be fixed by the military authority, take part in the labors of private industry.

Their pay shall serve to ameliorate their position, or will be accounted for to them at the moment of their liberation. In this case the expenses of maintenance can be deducted from this pay.

**Art. 26.** The prisoners of war shall in no way be obliged to take any part whatever in the operations of war.



**Art. 27.** The government in whose power the prisoners of war are, must pay for their maintenance.

The conditions of this maintenance can be established by a mutual understanding between the belligerent parties. In default of this understanding, and as a general principle, prisoners of war shall be treated, as regards food and dress, on the same footing as the troops of the government which shall have captured them.

**Art. 28.** Prisoners of war are submitted to the laws and regulations in force in the army in the power of which they are. It is permitted, after summons, to make use of arms against the prisoner of war who is escaping. When retaken, he can be subjected to disciplinary punishment or to a more severe surveillance.

If after having succeeded in escaping he is again made prisoner he is liable to no penalty for his previous flight.

**Art. 29.** Every prisoner of war is obliged to declare, if he is questioned in this respect, his true name and rank, and, in case of his infringing this rule, he shall be exposed to a restriction of the advantages accorded to prisoners of war of his category.

**Art. 30.** The exchange of prisoners of war is regulated by a mutual understanding with the belligerent parties.

**Art. 31.** Prisoners of war can be put at liberty on parole if the laws of their country [authorize] it; and in such a case they are obliged, on the guarantee of their personal honor, to fulfill scrupulously, both toward their own government and toward that which has made them prisoners, the engagements which they shall have contracted. In the same case their own government ought neither to exact nor expect of them any service contrary to their given parole.

**Art. 32.** A prisoner of war can not be forced to accept his liberty on parole; in the same way, the hostile government is not obliged to accede to the request of a prisoner asking for his freedom on parole.

**Art. 33.** Every prisoner of war liberated on parole and re-taken while bearing arms against the government towards which he has engaged his honor, can be deprived of the rights of a prisoner of war, and be brought up before the tribunals.

**Art. 34.** Those persons can also be made prisoners who, while with the armies, do not directly make part of them, such as correspondents and reporters to newspapers, vivandières, sutlers, &c. Nevertheless, they should be provided with an authorization emanating from a competent power, and with a certificate of identity.

### *The sick and wounded.*

**Art. 35.** The obligations of belligerents concerning the service of sick and wounded are regulated by the Geneva Convention of the 22d August, 1864, subject to the modifications which may be made to it.

*The military power with regard to private persons.*

**Art. 36.** The population of an occupied territory can not be forced to take part in military operations against their own country.

**Art. 37.** The population of an occupied territory can not be forced to take an oath of allegiance to the hostile power.

**Art. 38.** The honor and the rights of family, life, and the property of individuals, as well as their religious convictions and the exercise of their worship, are to be respected.

Private property can not be confiscated.

**Art. 39.** Pillage is formally forbidden.

*Contributions and requisitions.*

**Art. 40.** As private property must be respected, the enemy can demand of communities or inhabitants nothing more than the contributions and services relating to the necessities of war, which are generally recognized in proportion to the resources of the country, and which do not imply for the population the obligation of taking part in the operations of war against their own country.

**Art. 41.** The enemy which raises contributions, either as an equivalent of the taxes, or as requisitions to be paid in kind, or as a punishment, shall proceed as much as possible according to the laws which regulate the taxes in force in the occupied territory.

The civil authorities of the legal government shall lend their assistance to this, if they shall have remained in their functions.

Contributions can only be imposed on the responsibility of the general-in-chief, or of the superior civil authority established by the enemy in an occupied territory.

For every contribution a receipt shall be given to the person who pays it.

**Art. 42.** Requisitions shall be made only with the authorization of the commandant in the locality occupied.

For every requisition an indemnity shall be granted or a receipt delivered.

*Flags of truce.*

**Art. 43.** That person is considered as bearing a flag of truce who is authorized by one of the belligerents to enter into negotiations with the other, and who presents himself with a white flag, accompanied by a trumpeter, (bugler or drummer,) or also by a standard-bearer.

He shall have the right to inviolability, as well as the trumpeter, bugler or drummer, or the standard-bearer, who accompanies him.

**Art. 44.** The chief to whom a flag of truce is sent is not obliged to receive it under all circumstances and in all conditions. He is allowed to take all necessary measures to prevent the bearer of a flag of truce from profiting by his sojourn within the enemy's lines, to the prejudice of the latter, and if the bearer of a flag of truce has rendered himself culpable of this abuse, he has the right of retaining him temporarily.

He can declare in advance that he will not receive flags of truce during a fixed time.

Flags of truce which shall present themselves after such a notification from the side of the party which shall have received it, shall lose the right to inviolability.

**Art. 45.** The bearer of a flag of truce loses his right to inviolability if it is proved in a positive and incontrovertible manner that he has profited by his privileged position to provoke or commit an act of treason.

### *Capitulations.*

**Art. 46.** The conditions of capitulations are to be debated between the contracting parties.

They shall not be contrary to military honor.

Once fixed by a convention, they shall be scrupulously observed by both parties.

### *Armistices.*

**Art. 47.** An armistice suspends the operations of war by a mutual agreement of the belligerent parties. If its duration is not determined, the belligerent parties can at any time resume operations; provided, however, that the enemy is notified of it in proper time, conformable to the conditions of the armistice.

**Art. 48.** An armistice can be general or local. The first suspends everywhere the operations of war of the belligerent state; the latter, only between certain fractions of the belligerent armies, and within fixed lines.

**Art. 49.** The armistice ought to be official, and without delay notified to the competent authorities and to the troops. Hostilities are suspended immediately after the notification.

**Art. 50.** It depends on the contracting parties to fix in the clauses of the armistice the relations which can exist between the population.

**Art. 51.** The violation of the armistice by one of the parties gives to the other the right of denouncing it.

**Art. 52.** The violation of the clauses of the armistice by private persons, acting on their own initiative, gives right only to demand

the punishment only of those who are guilty, and an indemnity for the losses received, if any.

*Belligerents confined and wounded cared for by neutrals.*

Art. 53. The neutral state which receives on its territory troops belonging to the belligerent armies shall confine them as far as possible from the theatre of war.

It shall keep them in camps, and even imprison them in fortresses or in fit places.

It shall decide if the officers can be left free on taking an engagement on parole not to quit the neutral territory without authorization.

Art. 54. In default of a special convention, the neutral state shall furnish to the persons so confined, the food, clothing, and help commanded by humanity.

When peace is made, indemnity shall be given for the expenses occasioned by this confinement.

Art. 55. The neutral state can authorize the passage over its territory of the wounded or sick belonging to the belligerent armies, with the reserve that the trains which bring them shall not transport other soldiers or materials of war. In such a case the neutral state is bound to take the necessary measures of safety and control.

Art. 56. The Geneva Convention is also applicable to the sick and wounded on neutral territory.

# APPLICABILITY OF INTERNATIONAL LAW

## TO

### ORIENTAL NATIONS.

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*Paper presented to the Institute of International Law by the  
author of this Code.*

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At the last session of the Institute the following question was, on my motion, referred to a commission: "To what extent, and under what conditions, is the unwritten international law of Europe applicable to Eastern nations?" During a recent voyage around the world, I was led to observe the anomalous condition, with respect to international law, of all those parts of the globe which are not subject to Christian nations. We are not apt to reflect that what we call the law of nations is after all but a collection of rules which Christendom has made or sanctioned for its own people, and that the greater part of the earth is still outside of its authority. Not that it is wholly silent or unobserved beyond America and Europe; I do not mean that. I have seen it appealed to in the correspondence between the governments of China and Japan relating to the affairs of Formosa, and I know that books on international law are studied in both Japan and China, and that the treatise of Mr. Wheaton has been translated into Chinese.

Nevertheless the international relations of the governments and people of China and Japan, and not of them only, but of all non-Christian States, are very different from those which prevail among the States and people of Christendom. In Turkey and all its dependencies, as well in Europe as in Asia, in all of Africa except Liberia and the English and Dutch settlements about the Cape, and in all of Asia except Siberia and Hindostan, the rules of international law, if they are recognized at all, are recognized with many exceptions and modifications.

Phillimore, speaking of Christians in infidel countries, says that "those persons who are entitled to extraterritorial privileges retain the domicile of their own country, with all the incidental rights affecting their persons or property." (1 *Phil. Int. Law*, 2d ed., p. 398, citing HEFFTER.) And, again, "When a person is admitted to exteri

torial privileges, the things that belong to him, and the persons that form part of his household or suite, are, generally speaking, sheltered under the same immunities.

These privileges exempt them from liability to the civil or criminal tribunals. It is, however, possible that even privileged persons, by mixing themselves up with the trade or commerce of the country, or by becoming owners of immovable property therein, might of necessity be in some measure amenable to the civil tribunals."

"The privilege does not extend to real or immovable property. This, like the property of the native, is subject to the municipal law of the land."

The United States Consular Regulations of 1867 contain the following in respect to Mohammedan governments: "It may be assumed, in regard to these, as a principle of the international law of the world, so far as there is any, that unless there be an express agreement to the contrary, no Christian nation admits a full reciprocity of municipal rights, as between itself and any State not Christian, and, therefore, that in the Mohammedan governments above enumerated, Americans possess the rights of extritoriality which belong to all other Franks." Among the published opinions of the Attorneys-General of the United States is one on the functions of consuls (vol. 7, pp. 348, 349), in which are these passages:

"In our relations with nations out of the pale of Christendom we must and shall retain for our citizens and consuls, though we can not concede to theirs, the right of extritoriality. . . .

"When the countries now Mohammedan shall be subjugated to the doctrines of the Roman law, whether by the arms of Eastern or the arts of Western Europe, is of secondary moment to us, provided it be done; and not until then can they be admitted to the same reciprocal community of private rights with us which prevails in Christian Europe and in America. Until that happens, Turkey and other Moslem States in Africa or Asia may, like China and Japan, enter into the sphere of our public law in the relation of government to government, but not in the relation of government to men. That full interchange of international right is admissible only among the nations which have unity of legal thought, in being governed by or constituted out of the once dissevered but since then partially reunited constituents of the Græco-Roman Empire."

In the case of *Mahoney v. The United States* (10 *Wallace's Reports*, 62), the Supreme Court of the United States held, that upon Algiers becoming a French province, the functions of an American Consul previously accredited to that country became *ipso facto* changed. And the Court observed that "the full reciprocity which by the general rule of international law prevails between Christian States in the exercise of jurisdiction over the subjects or citizens of

each other in their respective territories, is not admitted between a Christian State and a Mohammedan State in the same circumstances.”

In the despatch of a former Minister of the United States to China, published by the American Government, this language was used: “The States of Christendom are bound together by treaties which confer mutual rights and prescribe reciprocal obligations; they acknowledge the authority of certain maxims and usages received among them by common consent, and called the law of nations, but which, not being fully acknowledged and observed by the Mohammedan and Pagan States, which occupy the greater part of the globe, is, in fact, only the international law of Christendom.”

In the treaty of 1844 between the United States and China (vol. 8, p. 592, art. 25), it was provided that questions between citizens of the United States in regard to rights, whether of property or person, should be subject to the jurisdiction and regulated by the authorities of their own government. A similar provision is contained in the treaty of 1858 (vol. 12, p. 1023). And the Act of Congress of 1860, passed to carry into effect treaties with China, Japan, Siam, Persia, and other countries, provides that the jurisdiction of the consuls of the United States in those countries is to be exercised in conformity with the laws of the United States, which were thereby extended over all citizens of the United States, so far as such laws were suitable to carry said treaties into effect, and when defective or unsuitable, the common law, including equity and admiralty, is to be extended in like manner over such citizens in the said countries; “and if defects still remain, to be supplied, and neither the common law, including equity and admiralty, nor the statutes of the United States, furnish appropriate and suitable remedies, the ministers in the said countries respectively shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.”

Notwithstanding these and similar authorities, there are instances in which the local laws of Eastern countries have been applied to dealings between their people and citizens of the United States. Thus in the case of *Consequa v. Fanning* (3 *Johns. Ch.*, 587), Chancellor KENT decided that the Chinese law, in respect to the interest of money, should be taken as the rule of decision by our Courts.

As a general rule, however, it may be considered certain that the law of nations, as understood in Christendom, is not yet extended in its plenitude to the rest of the world. The reason is obvious. That law was first planted in Europe, and has been cultivated only in Europe and America. Its object is the intercourse and community of nations. The object of all people outside of Christendom has been conquest or isolation and non-intercourse. China shut herself up in fancied superiority; Japan, after admitting foreigners for a hundred

years, excluded all but a few Dutch walled in and guarded at Nagasaki. Other Asiatic nations and tribes breathed the same spirit and pursued the same policy. In short, while the spirit of Christendom was brotherhood, the spirit of the rest of the world was seclusion or domination. When intercourse began, it was confined and partial, limited in place and limited in objects. Indian princes admitted a few trading factories; China allowed commerce only with the port of Canton, and then under numberless restrictions and impediments. Foreigners thus admitted must of necessity be kept apart, and the way to keep them apart was to make them not only live by themselves but take care of themselves, which meant that they must govern themselves. To have as little intercourse with them as possible was the policy of the native governments.

On the other hand, it was necessary for the protection of the foreigners that they should be kept out of the way of the natives as much as was possible. For these two reasons, foreigners formed separate communities governing themselves; the natives, on their part, abstaining from intrusion so long as there was no attempt to pass beyond the limits assigned, and the foreigners, on their part, not going beyond them. Each foreign settlement thus became an *imperium in imperio*, the chief of the settlement being, in most cases, the consul of the country of the settlers.

The relations thus established were generally settled in treaties. There are many such. The United States alone, during the hundred years of their existence, have had more than thirty, reaching to nearly every organized State and many half-organized tribes; to Turkey, China, Japan, Persia, Siam, Madagascar, Borneo, Muscat, Lew Chew, Morocco, Algiers, Tripoli, and Tunis. By these it is generally provided that American consuls shall have exclusive jurisdiction over civil disputes between American citizens. The treaties with Turkey, China, Japan, Siam, Morocco, Madagascar and Borneo give the consuls exclusive jurisdiction over crimes committed by Americans in the territories of the other: the treaties with Turkey, China, Persia, Siam and Madagascar give jurisdiction jointly to American consuls and officials of the other state over civil controversies between Americans and natives; the treaties with Japan give jurisdiction to the consular courts of claims of the Japanese against Americans, and to the Japanese courts of claims of Americans against Japanese; while the treaty with Borneo gives the consular courts exclusive jurisdiction of civil disputes between an American citizen and a Bornean subject.

This condition of things gives rise to many perplexing questions, and creates no little embarrassment. I have heard the Khedive of Egypt complain, before the introduction of mixed courts lately accomplished, that he was unable to invite foreign capital into his country as he would wish, because, in case of the non-fulfillment



of their contracts by foreigners, he had no remedy but to proceed against them in the consular courts. One of the questions growing out of the present condition of things arose while I was at Shanghai. This settlement is built on one of the tributaries of the Yang-tse-Kiang, and near the mouths of both rivers. The title to the soil, like that of all China, is in the Emperor, leases being given to the settlers. Besides these leases, the Government has made three grants, called respectively the American, English and French concessions, the legal effect of which appears to be to give to the settlers, or rate-payers as they call themselves, the right of local administration, and to the respective consuls the right of jurisdiction, to be exercised sometimes alone and sometimes in conjunction with a Chinese mandarin sitting in what are called mixed courts. The question was this: Some American residents, citizens of different States, being about to borrow money of an English bank upon a mortgage of their real property in Shanghai, the execution of the mortgage by their wives was required. By what law was the point to be decided—by the law of China, or the law of England, or the laws of the American States?—it so happening that in some of those States the wife had a right of dower, in others none. If the land had been situated in Russia, at the mouth of the Amour, there could have been no question in the case, for the laws of Russia would alone have been consulted. What in principle should make a difference in this respect between land at the mouth of the Amour and land at the mouth of the Yang-tse-Kiang? Is it that one is in a Christian and the other in a non-Christian country, or that one is civilized and the other uncivilized? The former distinction is palpable, whether a just one or not; the latter depends upon the meaning of the word civilization. What is civilization, and in what respects is that part of Russia superior to China? No doubt the culture and manners of St. Petersburg are superior to those of Pekin; but is Petropavlosk better in its official establishment or in its administration than Shanghai? But if it were admitted that the administration of justice and the other functions of government are better performed in Siberia than in China, yet is the difference so great that one is entitled to be pronounced civilized and the other uncivilized? Is not the difference one of degree only? Can it be justly claimed that a nation which has maintained a regularly administered government, over hundreds of millions of human beings, for thousands of years; which had invented gunpowder and printing before they were dreamed of in Europe; which had a cultivated literature and perfected arts, while yet our ancestors were clothed in skins and lived on uncooked food—can it, I repeat, be justly said of such a nation that it is uncivilized? It must be admitted, I think, that the point of civilization is not the one on which the question of international law, in its application to China, should

turn. As to the other reason, that which depends upon the reception of Christianity, it can not be a reason why one nation should be excluded and another admitted into the brotherhood of nations.

The chief reason why international law has not been applied to these nations is, I conceive, historical. That law began in Europe, was applied to Europe, fashioned for it, before intercourse with Asiatic and African countries had grown into considerable proportions. There is, however, another reason besides the historical one. An envoy of the United States, writing to his government, used this language: "I entered China with the formed general conviction that the United States ought not to concede to any foreign government, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign State be of our own family of nations—in a word, a Christian State. . . In China I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the Empire. . . I deemed it, therefore, my duty to assert a similar exemption on behalf of citizens of the United States."

It was probably the intention of the envoy to convey the idea that the difference in rights arose not from the difference in religion, but from the difference in laws and social habits, such differences being in part due to other causes than religion. Whatever may be the minor discrepancies, there is a general similarity in the laws of the different American and European States outside of the Ottoman dominions, as every one can see who will take the trouble to compare the codes of the different countries. But the divergence becomes wider when we pass into Asia. There, to mention no other peculiarities, the legal position of women and the laws of descent are fundamentally different.

What then should be our conclusion respecting the desirableness and practicability of extending international law in its plenitude over all the States and communities of the world? There is no difficulty in answering this question, so far as it respects all those portions of the laws of nations which concern the relations of nations to each other; that is to say, their essential rights of sovereignty, equality, perpetuity, territory and property, their extra territorial action, their intercourse and compacts with other nations, and their rights of asylum and duty of extradition. In respect to those portions of the laws of nations which concern the relations of nations to the persons and property of the members of other nations, that is to say : those which relate to national character, to domicile, to national jurisdiction, to the duties of a nation to foreigners and of foreigners to the nation, the first two are applicable to the Oriental nations, and the last three are also applicable, with modifications which will be afterwards mentioned, and which may be more or less relaxed, as intercourse in-

creases and assimilation goes on. Those regulations for mutual convenience, which form the subjects of so many modern treaties, are applicable to all nations, Western or Eastern, Christian or Pagan, to a greater or less extent, commensurate with the extent of that intercourse, the convenience of which it is the object of such regulations to subserve. And all the provisions for the preservation of peace which are proper for the most advanced nations are none the less proper for the less advanced. All those regulations of international law which respect the carrying on of war are applicable to all nations alike, the most and the least enlightened.

Private international law, that which treats of the relations of the members of a nation to the members of other nations, and under which are grouped all international rules respecting personal capacity and relations, marriage, divorce, contracts, descent and the administration of justice, is also applicable to Eastern no less than Western nations, except in respect to the administration of justice. We have, then, these points of divergence, the jurisdiction of Oriental nations over travelers and traders from the West, and the administration of justice where such persons are concerned.

How shall they be dealt with? So long as the judicial institutions of Oriental States remain as they are, it is impossible to subject Americans and Europeans to their jurisdiction. No one accustomed to the judicial procedure of the West would ever willingly be subject to the procedure of the East. There torture is in constant use, oaths are rarely administered, advocates are unknown, and, instead of fixed rules of decision according to law, the caprice of the judge or a vague notion of justice controls the decision. I have myself seen accused persons brought up for trial before a Chinese judge. Each one was brought in with a chain around his neck, the end of which was fastened to a heavy stone that he was obliged to lift when he moved; on entering the judge's presence he sank upon his hands and feet and remained so during the trial, scarcely daring to look up; a crowd of retainers surrounded the judge and took part in the trial, interrupting him, suggesting questions and making statements; and when the poor creature dared deny the charge, he was instantly put to the torture by men in waiting, who seemed as much part of the court as the judge himself. The punishments inflicted in all Oriental nations are strange and cruel, crucifixion being often among them. It would be revolting to subject our countrymen to such an ordeal and the chance of such a punishment.

It seems to me possible to obviate the difficulty by the establishment of mixed courts and a special procedure, for the disposition of the cases in which Americans and Europeans are parties. Approaches to such an arrangement have already been made. Mixed courts have been some time in existence at Shanghai and have worked well.

The practice there is for a consul to sit with a native judge in cases against natives where a foreigner is interested, and for a native judge to sit with a consul in cases against a foreigner where a native is interested. These also I have witnessed, and I see not the slightest difficulty in their practical operation. The late treaty between the United States and Japan provides that the claims of Japanese against Americans are to be prosecuted in the consular courts, while the claims of Americans against Japanese are to be prosecuted in the courts of Japan. Upon the whole, it appears that we have now arrived at a stage in the intercourse of nations when a rule more liberal than that heretofore applied may be adopted by Christendom. It is for the interest of civilization and humanity that Eastern nations should be brought as soon as possible within the pale of international law.

So lately as June of the present year a step of great importance has been taken, by the establishment in Egypt of mixed courts, consisting of a court of appeal, in which there are six European judges and four natives, and of courts of first instance, held by natives and foreigners.

My own conclusions, in short, are these :

I.—Oriental nations, or, to be more precise, non-Christian nations, should be admitted to all the rights and subjected to all the duties of the nations of the West, or, in other words, Christian nations, as such rights and duties are defined by international law, with the single exception :

II.—That until there is a greater assimilation between the nations of the East and the West with respect to judicial institutions, mixed courts and a special procedure should be established for the decision of all cases, public or private, in which Americans and Europeans are parties.

*August 2, 1875.*

DAVID DUDLEY FIELD.

## PROPOSITION OF PERU.

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The following circular has been sent by the Minister of Foreign Affairs of Peru to the Governments of Bolivia, Brazil, Chili, Costa Rica, Colombia, the United States, Ecuador, Guatemala, Honduras, Hayti, Mexico, Nicaragua, Paraguay, Argentine Republic, Santo Domingo, Salvador, Uruguay, and Venezuela:—

LIMA, *Dec. 11th*, 1875.

SIR:—

Since the heroic struggle waged by the majority of the American States to attain their independence, and notwithstanding the change and derangement following the establishment of a different form of government, they have constantly endeavored to legislate in harmony with the fundamental law adopted in consequence of their freedom, and they have sought to introduce all the reforms demanded by the spread of science and the natural progress of modern society.

In new States which were therefore obliged to overcome many difficulties impeding their organization, this important labor has been necessarily as slow and painful as the epoch was critical and difficult in which it has been carried out.

And now that their internal efforts have been crowned with success, they have become convinced that they must think of strengthening the friendly ties which unite them, by assimilating their legislation so far as possible.

The spread of international relations, the rapid communication afforded between different countries by the spread of steam and telegraphy; the facilities which those two elements offer to commerce; the interest of each nation in the progress of the others, since that progress must redound to the benefit of all, and the inconveniences which spring from the differences of laws, have attracted the attention of thinking men on this continent; and the general idea, springing from all these circumstances, and taken up by a society of jurists, has given rise to a project presented by them to my Government, suggest-

ing the advisability of convoking a Congress of Jurists, to discuss and bring into harmony the legislation of the different American States, taking from each one that which may seem most perfect, and coming to a definite agreement especially upon the following points:

*Firstly.*—As a general basis for all cases not specially determined, to procure uniformity of legislation on private matters, so far as the particular circumstances of each country will permit it, and to state in the different codes the points on which such uniformity is impossible, and the manner in which questions shall be decided, which may arise in consequence of such want of uniformity;

*Secondly.*—To concede in each State to citizens of the others the same rights as to its own citizens;

*Thirdly.*—To simplify as much as possible the formalities of marriage between citizens and between citizens and foreigners;

*Fourthly.*—To establish uniformity in the forms of contracts and documents creating obligations.

*Fifthly.*—To fix common rules for the execution of civil judgments and the carrying out of letters rogatory;

*Sixthly.*—To declare in the different codes the cases of extradition, and the modes of effecting them;

*Seventhly.*—To assimilate commercial legislation, particularly in matters of bankruptcy and patents;

*Eighthly.*—To establish common rules for literary property;

*Ninthly.*—To assimilate the coinage, weights, and measures;

*Tenthly.*—To establish a postal convention between all the States.

It is impossible to overestimate the importance of this idea, which has occupied the attention of the people of the continent, which originated with them, which receives the support of the greatest intellects of America, and from which the most useful results are to be obtained; and the Government of the undersigned, which sees in the meeting of a Congress of Jurists for the purpose of assimilating as far as possible the legislation of the different States, the most solid basis on which an American Union can be supported, gladly submits this idea to the high consideration of your Excellency, in the hope that if it should be well received, your Government will appoint representatives authorized to enter upon so important a transaction.

The Congress might meet in Lima, or in any other place which the majority of the Governments might determine, and it might commence its sessions with such Plenipotentiaries of the invited nations as are present at the time fixed for installation, and to their decisions the other nations might agree either during the sessions or subsequently.

The undersigned, &c., &c.,

A. V. DE LA TORRE.

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